SUMMARY OF AND AGENCY RESPONSES TO
PUBLIC COMMENTS FROM THE
SECOND PUBLIC COMMENT PERIOD
REGARDING PROPOSED AMENDMENTS TO THE
CHESAPEAKE BAY PRESERVATION AREA DESIGNATION AND
MANAGEMENT REGULATIONS (9 VAC 10-20),
AS REVISED AND ISSUED BY THE BOARD ON JULY 30, 2001
And
RECORD OF BOARD ACTIONS AT OCTOBER 31, 2001 WORK SESSION

MEETING RECORD:

The Chesapeake Bay Local Assistance Board met on October 31, 2001 at the CBLAD Conference Room in the James Monroe Building at 101 North 14th Street, Richmond, Virginia, to conduct a work session on proposed regulation amendments. The Board was discussion public comments from a second public comment period, held during August 2001, and the agency's responses and recommendations regarding the comments received. Scott Crafton, agency regulatory coordinator, let the discussion.

The Board had been provided with a public comment summary and response document to review prior to the meeting. This document included further language changes recommended by staff in response to some of the comments. Mr. Crafton proposed that the Board first discuss the specific comments and regulation sections where recommended changes were being proposed. Then, Board members could raise questions or concerns about any of the other comments submitted. Finally, members of the public attending the meeting would be given an opportunity to provide verbal comments regarding the regulations.

The following is the content of the Public Comment Summary/Response document sent to the Board prior to the work session, with the addition of notes regarding Board actions during the meeting. These actions and additional discussion by the Board, included in the body of the following text, are denoted in this document by ***boldface-italicized type*** (not to be confused with outline headings as seen directly below). This document does note where the Board voted on each proposed change to the earlier proposed amendments, but additional notes are not added where the Board agreed with staff recommendations for no further changes in response to public comments on specific regulation sections.

Section Reference: **9VAC10-20-40**
Subject: Definitions – Agriculture
Commenter: The Sierra Club (Falls of the James Chapter) and the Virginia Association of Counties

Comments/Issues: The Sierra Club requests that the Board delete the language ". . . other lands as defined by local government . . . ." They contend that localities are abusing

the designation by allowing the agricultural classification to apply to such activities as churches of historical size and commercial storage units. VACO recommends that the Board include a definition of agriculture to clarify what is meant by agricultural activities, just as was done by adding a definition of "silvicultural activities."

CBLAD Response: Agricultural activities have always been generally characterized in 9 VAC 10-20-120.9. Draft regulations have added "or lands otherwise defined as agricultural land by the local government." Such a characterization was not included for "silviculture." CBLAD staff believes it is more difficult to arrive at a consensus definition of "agriculture," since there are so many varying definitions already in regulations and law. In fact, the Board's regulatory advisory committee discussed this and could not reach agreement. Staff also believes there are valid reasons to keep the language recognizing local authority to define agriculture. For example, Fairfax County defines agriculture to include parcels as small as 5-acres that have horses, since these generate agricultural waste; and the County and local SWCD focus water quality protection efforts on such sites as well. CBLAD staff recommends that there be no further change with regard to these comments. (rw/sc)

Section Reference: **9VAC 10-20-40.**
Subject: Definitions – Redevelopment
Comments made by: The Sierra Club (Falls of the James Chapter)

Comments/Issues: The comments address a concern that the change to revert to the original definition of redevelopment and subsequent change to performance criteria for redevelopment will contribute to use of wetlands and destruction of tributary streams. Another concern is that the footprint of original development will be allowed to expand and cause greater loss of wetlands and impacts upon state waters. Furthermore, the commenter expressed a general concern with designation of IDA's.

CBLAD Response: CBLAD determined that adding a performance standard to a definition was not appropriate and would be better addressed in the section containing performance criteria for redevelopment. IDAs are areas with concentrated development and where little natural resources remain. Within IDAs, specific stormwater management criteria and erosion & sediment control requirements must be met. IDAs must also be reviewed and approved by the Chesapeake Bay Local Assistance Board to ensure they are properly designated. CBLAD does not envision that IDAs would include wetland areas or areas with other sensitive natural features, since the presence of such features would likely result in the Board not approving the IDA designation. The effect of the new change clarifies that redevelopment within an IDA may further encroach and that redevelopment activities that are proposed outside of IDAs cannot further encroach or create more impervious cover. This will allow for the intended use of IDAs and is consistent with the Chesapeake Bay Program goals and commitments to discourage sprawl. Therefore, CBLAD staff recommends that there be no further change with regard to these comments. (ml)

Section Reference: **9VAC 10-20-40.**
Subject: Definitions – Redevelopment
Comments made by: Fairfax County

Comments/Issues: The July 30, 2001 draft of the revised Regulations deletes the language that had been proposed in the October 9, 2000 draft of the revised Regulations. A clarification is provided in 9 VAC 10-20-130 that redevelopment shall be allowed in Resource Protection Areas (RPAs), but only if there is no increase in impervious cover. It is still unclear how the definition of "redevelopment" is to be applied in Resource Management Areas (RMAs). Guidance should be provided to localities regarding how to differentiate redevelopment from new development in RMAs, and the County's current approach (considering net increases in impervious cover of up to 20% in the RMA to be "redevelopment") should continue to be viewed as an acceptable alternative.

CBLAD Response: The proposed and final amendments to this section were intended to clarify the performance standard for redevelopment as it relates to encroachment into the RPA. There are now no changes proposed to the existing definition of redevelopment, so there be no effect on current approaches to redevelopment within the RMA. CBLAD will be examining this issue through future implementation reviews and guidance. This comment does not require any further changes in the regulations. (ml)

Section Reference: **9 VAC 10-20-40**
Subject: Definition of Perennial Streams
Comments made by: The Chesapeake Bay Foundation, Fairfax County, the Home Builders of Virginia, and the Sierra Club (Falls of the James Chapter)

Comments/Issues: The Chesapeake Bay Foundation stated that removal of the definition of "tributary stream" in favor of determining a "water body with perennial flow" only makes sense if that determination (under 9 VAC 10-20-80.D) includes the optional standard of any body of water with a minimum drainage area of 140 acres (referencing a study conducted by Chris Athanas and Michael S. Rolband). CBF understands that this approach might exclude perennial streams that originate from natural springs, but the field determination required at the time of development (9 VAC 10-20-105) would likely verify them as water bodies with perennial flow, regardless of watershed size. CBF also noted that "perenniality" is not a word and should be replaced with terminology composed of dictionary-referenced words.

The HBAV expressed concern that the deletion of the definition of "tributary stream" and, therefore, the lack of a clear definition of tributary streams will lead to inconsistency throughout the area covered by the Act. Localities should have the right to further define tributary streams. However, all should be using the same set of criteria. Additionally, this could lead to inexperienced planning staff making purely subjective judgments in the field.

The Sierra Club expressed a different concern that the elimination of the definition of "tributary stream" or, alternatively, the lack of inclusion of a definition of "perennial stream" has the effect of writing off these streams as if they do not exist and risking turning them into storm drains. They criticize the revised language as moving away from buffering tributary streams toward buffering only "water bodies with perennial flow", considering this inadequate for protection of state waters that derive their wetness from recharge wetlands and tributaries.

Fairfax County notes that if the definition of "tributary stream" is to be deleted, then uses of that term should be deleted in the other places it appears in the regulations: 9 VAC 10-20-130.5.b(4) and 9 VAC 10-20-231.1.a.

CBLAD Response: The Board decided to eliminate options related to drainage area size due to the fact that there was no agreement or even consensus among the various commenters on an appropriate drainage area threshold. The Board agreed that specifying a drainage area threshold is not so important in the regulations, since they are now requiring a site-specific determination of flow characteristics (perennial or intermittent) at the time a plan is submitted for approval.

Staff takes note (1) that "perenniality" is not a word in the dictionary that is the key reference for terms in Virginia Regulations, and (2) that the term "tributary stream" still appears in a couple of sections of the regulations. Alternative terminology will be substituted.

During a meeting with the HBAV, CBLAD staff provided their representatives with a copy of a draft protocol for determining the flow characteristics of a stream using in-field criteria. We explained that this protocol would be field-tested in a research project during FY02 and result in a guidance document and associated training to be provided to all CBLAD localities to provide a common standard for site-specific determinations. As well, it is our expectation that this guidance will be accepted as a common reference for other water programs in Virginia, including those of the DCR and DEQ. However, other methodologies may also be applicable.

CBLAD staff disagrees with the Sierra Club's characterization of the impact of this language change. CBLAD has always interpreted "tributary stream" to mean a perennial stream or, said another way, a stream ". . . with perennial flow." In that respect, this change of terminology will not result in any practical changes in the way the program is being implemented. If using the term "water bodies" rather than simply "streams" has any impact on the expansiveness of RPAs, the result should be more rather than less land included. (sc)

Text as initially recommended for change:

In 9 VAC 10-20-40:

[~~*"Tributary stream"* means any perennial stream that is so depicted on the most recent U.S. Geological Survey 7-1/2 minute topographic quadrangle map (scale 1:24,000), *or any stream segment that has a drainage area of at least 320 acres (one-half square mile), or both. Alternatively, local governments may conduct more thorough investigations to accurately determine the perenniality of stream.*~~]

In 9 VAC 10-20-130.5.b(4):

[*(4) If specific problems are identified pertaining to agricultural activities which, in the opinion of the local soil and water conservation district board, are causing pollution of the nearby tributary stream or violate performance standards pertaining to the vegetated buffer area, such problems must be corrected within a specified period of time that takes into account the seasons and other temporal considerations so that the probability for successfully implementing the corrective measures is greatest.*

In 9 VAC 10-20-231.1.a:
a. Utilizing existing data and mapping resources to identify and describe tidal wetlands, nontidal wetlands, tidal shores, tributary streams, flood plains, highly erodible soils including steep slopes, highly permeable areas, and other sensitive environmental resources as necessary to comply with Part III (9 VAC 10-20-70 et seq.) of this chapter;

Text as now recommended for change:

No change recommended in 9 VAC 10-20-40 (Definitions).

In 9 VAC 10-20-130.5.b(4):

[*(4) If specific problems are identified pertaining to agricultural activities which, in the opinion of the local soil and water conservation district board, are causing pollution of the nearby* ~~***tributary stream***~~ ***water body with perennial flow*** *or violate performance standards pertaining to the vegetated buffer area, such problems must be corrected within a specified period of time that takes into account the seasons and other temporal considerations so that the probability for successfully implementing the corrective measures is greatest.*

In 9 VAC 10-20-231.1.a:

a. Utilizing existing data and mapping resources to identify and describe tidal wetlands, nontidal wetlands, tidal shores, ~~***tributary streams***~~ ***water bodies with perennial flow****, flood plains, highly erodible soils including steep slopes, highly permeable areas, and other sensitive environmental resources as necessary to comply with Part III (9 VAC 10-20-70 et seq.) of this chapter;*

The Board voted unanimously to adopt these two changes. Furthermore, the Board noted that the definition of "Resource Protection Area" needs to be changed also, consistent with the change recommended in 9 VAC 10-20-80.A (about which no

comments were submitted during this comment period). The Board asked staff to bring proposed language to their December 10, 2001 quarterly meeting where they will considering adopting final regulations.

Text as now recommended for change:

In 9 VAC 10-20-40 (Definitions):

"*Resource Protection Area"* means that component of the Chesapeake Bay Preservation Area comprised of lands ~~**at or near the shoreline**~~ ***adjacent to water bodies with perennial flow*** that have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may result in significant degradation to the quality of state waters.

Section Reference: **9 VAC 10-20-50**
Subject: Buffer goal
Comments made by: The Chesapeake Bay Foundation and the Home Builders of Virginia

Comments/Issues: The CBF considers the proposed deletion of language [added in the earlier draft amendments] that requires local governments to assure that ". . . all streams and shorelines will be protected by a forested or other riparian buffer area . . ." to be inconsistent with the intent of the Bay Act, other portions of the regulations and the goals regarding forested buffers outlined in the Chesapeake Bay 2000 Agreement. CBF sees no justification for the deletion of this language, recommending that it remain as originally proposed. On the other hand, the HBAV supports deletion of this language.

CBLAD Response: Given that this goal was not included among those listed in the Act (the first five goals listed in this section of the regulations) and that the program has existed for 12 years without this language, it is difficult to understand how not including it now is inconsistent with the Act's intent. In fact, whether or not it is included has little practical bearing on the program's implementation. In that regard, since there were concerns and objections voiced in the earlier public comment period, the Board decided to not include it after all. CBLAD staff consider the Bay Act program to be supportive of the buffer goals and related policies articulated in the Riparian Forest Buffer Directive of 1996 and the Chesapeake Bay 2000 Agreement even without this language. Therefore, CBLAD staff recommends that there be no further change with regard to these comments. (sc)

Section Reference: **9 VAC 10-20-80.B.2**
Subject: Resource Protection Areas (perennial water bodies)
Comments made by: Fairfax County

Comments/Issues: Since the definition of "tributary streams" has been deleted and replaced in the body of the regulations with the term "water bodies with perennial flow", the latter term should be defined. Using this new terminology could result in a significant

expansion of RPAs and represents a significant departure from the earlier proposed draft of the proposed amendments (October 9, 2000). Since the earlier DPB economic impact assessment did not consider this provision, the DPB should carefully evaluate and report on the potential impacts of this change prior to the Board taking any action. Perhaps consideration could be given to including this method as an option among all the other options used up to now by localities in designating their RPAs.

CBLAD Response: CBLAD is researching and developing a protocol for use in making field differentiations between perennial and intermittent streams. Since all localities have already made initial designations of perennial streams based either on USGS maps or other methods acceptable to the Board, the key difference in the proposed amendments is the need to refine the determination at the time of a submission for a site plan approval. As noted above, the CBLAD will provide a guidance protocol to be sure all Tidewater localities will have a methodology to use to make these refined determinations. Therefore, staff does not see the need for a definition, since it will have no practical effect on existing designations and no bearing on the refinement process. Furthermore, based on the wide-ranging comments on the earlier proposed definition, it is clear that there is no consensus regarding an appropriate definition. The Board agreed that this issue is better addressed in the criteria rather than by definition. Therefore, CBLAD staff recommends that there be no further change with regard to these comments. (sc)

Section Reference: **9 VAC 10-20-80.B.5**
Subject: Resource Protection Area
Comments made by: The Home Builders Association of Virginia

Comments/Issues: Subsection 80.B.5 deletes the reference to equivalent measures and the language that allows reduction in the buffer zone based on reliable site-specific information. The HBAV considers this to be a major change and, when taken in conjunction with other language, it will prohibit modification of the buffer zone based on the use of BMPs that demonstrate "water quality equivalency" and will severely restrict the ability to encroach in the buffer zone. The equivalency concept was one of the principal features that made the CBPA regulations acceptable. The HBAV believes this deletion substantially changes the program.

CBLAD Response: There were no additional changes to the regulations in this section from the first public comment period. The provision referred to in the existing regulations that relates to equivalent measures was deleted for clarity as noted in the original document explaining the proposed amendments (see the response to related comments pertaining to 9 VAC 10-20-130.3). However, this section of the regulations relates to correctly designating Resource Protection Areas (RPA) and is not intended to address any water quality functions of the various RPA components. The revised section merely makes it clear that the 100-foot buffer is required as the landward component of the RPA, and as such, delimits the outermost boundary of the RPA. The buffer component is required to be 100-feet in width, as outlined in both the existing and proposed regulations (see Section 9VAC10-20-80B.5: ". . . a buffer area not less than 100 feet in width located adjacent to and landward of the components listed in subsections 1

through 4 above, and along both sides of any tributary stream. The full buffer shall be designated as the landward component of the Resource Protection Area . . . .").
The provision for equivalent measures did not preclude the designation of a buffer area "not less than 100 feet wide." It related instead to a performance measure that must be met when permitted activities occur within the buffer component of the RPA. Development activities in the RPA are limited to redevelopment activities and water dependent facilities under the regulations. The removal of this phrase in the designation criteria portion of the regulations does not prevent the use of equivalent measures by localities when considering permitted encroachments, or removal of vegetation within the 100-foot buffer component of the RPA.

Given that the existing regulations and the proposed regulations make it clear that the buffer area component of the RPA is to be 100 feet in width, the provision that related to site-specific information was moved to become its own subsection (see 9 VAC10-20-80.C) to better reflect the intent of the regulations. The other components of the RPA will vary from most mapped RPAs in that they were first delineated using mapping information that was not intended to provide for specific site designations. In that context, the actual outermost boundary of any mapped RPA may vary from the original designation created by the local government. To better reflect this situation, site-specific RPA component designation is proposed to be required as outlined under 9VAC10-20-105 and subdivision 6 of 9VAC10-20-130. Therefore, CBLAD staff recommends that there be no further change with regard to these comments. (ss)

Section Reference: **9 VAC 10-20-80.D**
Subject: RPA designation (determination of perennial flow)
Comments made by: The Chesapeake Bay Foundation, the City of Chesapeake, the Hampton Roads Planning District Commission, the Home Builders of Virginia, Melissa McCanna (consulting wetlands scientist), and the Northern Virginia Regional Commission

Comments/Issues: The City of Chesapeake commented that the types of in-field indicators considered to be acceptable for use by localities in determining perennial flow should be included in this section.

The HRPDC noted that in the new revisions, the proposed requirements in 9 VAC 10-20-105 to identify the boundaries of RPAs based on site-specific determinations of perennial flow in streams conflicts with the provisions in 9 VAC 10-20-80.D (alternate methods for generally determining the perennial nature of water bodies). If a locality has used USGS topographic maps to designate perennial streams and RPAs, and a landowner has purchased property believing that no perennial streams exist on his/her property but then finds that the site-specific determination reveals the actual existence of a RPA feature, his/her investment backed expectations may be disrupted, which may expose the local government to legal challenge. If this conflict is not removed, localities may be forced to use only the "scientifically valid system of in-field indicators of perenniality" (for which guidance/criteria have yet to be provided), rather than having alternatives available (as CBLAD has indicated is the intent). Performing such studies will involve considerable

time and expense. In order to eliminate the perceived inconsistency between the two sections, HRPDC recommends requiring (in 9 VAC 10-20-105) site-specific determinations only to confirm or dispute what is indicated in the officially adopted maps under 9 VAC 10-20-80.D. The HRPDC and the City of Chesapeake stated that in all cases man-made stormwater drainage ditches should be excluded from the definition of perennial streams.

The NVRC, on the other hand, states that the new language in this section appears to satisfy their original concerns with the earlier changes to the definition of "tributary stream". They noted that replacement of the term "tributary stream" goes a long way towards clarifying the intended extent of the RPA buffer area. However, the intent of the phrase ". . . site-specific determinations shall be made or confirmed by the local government pursuant to 9 VAC 10-20-105. . ." needs to be made more explicit. Based on the 8/28/2001 meeting with CBLAD staff, the NVRC staff and Northern Virginia localities understand the phrase to mean that the CBPA map is not an official zoning map and therefore does not require a vote by the governing body every time an adjustment is made. Rather, the map is intended to be a guide that will change based on an actual field study of the flow characteristics of the stream in question. Furthermore, NVRC staff understands that a site-specific determination is required regardless of the original methodology used in mapping RPAs (e.g., using the USGS topographic maps). Many localities and developers, however, have assumed that the CBPA map <u>is</u> a zoning map and not subject to adjustments based on field surveys. Further, many localities do not currently require a site-specific determination, and many developers are likely to be surprised by the requirement. NVRC staff strongly recommends that language be added to clarify the intent of this requirement.

The HBAV recommends that if the Board continues with this potentially subjective system of determining and refining the identification of perennial streams, then a technically based mechanism should be provided through which a property owner may appeal a determination. This could be accomplished by a related (objective) agency, such as the Army Corps of Engineers or DEQ, or internally by properly trained CBLAD staff.

Ms. McCanna believes allowing continued use of USGS topographic maps as a means of generally determining where perennial streams are located is problematic. Adding a requirement for site-specific determinations (in 9 VAC 10-20-105) is a positive step, but more guidance is needed about such determinations. She recommends that the language be further revised to state that determinations of perennial flow based on USGS maps will be given the least weight and that other mechanisms for these determinations, such as drainage area, be given higher priority based on the best available science.

As noted before, the CBF points out that the term "perenniality" does not appear in the dictionary cited by the Code Commission as the appropriate reference for terms in regulations.

CBLAD Response: Based on the current regulatory language, CBLAD observes among localities various levels of reliance of the USGS maps as the baseline for identifying

perennial streams. The Board's clear intention is that RPAs be designated adjacent to waters with perennial flow. This includes man-made ditches with perennial flow, because at any point in time the constant flow provides the means for pollution entering the ditch to be carried into nearby tributaries and, ultimately, to the Chesapeake Bay.

However, some localities insist that the USGS map designation must prevail, even if site evaluations prove a contrary result. Some localities have been willing to recognize challenges to the USGS map indication if the result were a smaller RPA on a site, but not if the result were an expanded RPA. This is the problem with HRPDC's recommendation to only require site-specific determination to resolve disputes pertaining to the local CBPA maps. If a property owner has, in fact, a perennial stream on his/her property but the map shows it as intermittent (no RPA), he is not likely to dispute the map. Therefore, disputes are likely to result only in instances of reducing RPAs due to findings of intermittent rather than perennial flow. This is contrary to the Board's intent, and such inconsistencies have generated many complaints from both citizens and local governments for clearer direction from the Board and a fairer process more consistently applied.

There is broad agreement, as Ms. McCanna points out, that the USGS maps are not completely accurate regarding the differentiation between intermittent and perennial streams. However, the USGS maps are relatively inexpensive and readily available resources to use to make general RPA designations, which was the Board's intent for their use. The Board did not intend that the resulting RPA maps must be "official" zoning maps – which require an elaborate, time-consuming process to change – but rather, as the NVRC points out, the RPA maps are intended to be a general guide to where RPA boundaries are located. Of course, each local government has the option of making the maps zoning maps if they choose, but that would then require a much more involved process for making changes. The Board expected that RPA boundaries depicted on these maps might need to be changed sometimes, based on an actual field study of the flow characteristics of the streams in question. They envisioned a simpler administrative process for making such changes. In order to minimize liability, localities can label their maps as providing general guidance, noting that the actual RPA boundaries might have to be adjusted based on a more in-depth investigation of the stream's flow characteristics if the owner decides to develop or otherwise change the use of the land.

However, in order to assure that all perennial streams are bounded by RPAs, some process of refining the initial, rough designations must be conducted. The most appropriate opportunity for this refinement is during the local plan-of-development review process. This avoids the need for localities to conduct in-depth studies of their entire stream network, but provides the opportunity to evaluate streams on properties proposed for development prior to the development actually occurring. However, the timing of this requirement does not prevent any locality from proactively conducting in-depth studies to develop RPA maps with precise boundaries.. Those that do so could avoid the need to perform any boundary refinements later. The Board agrees that this would be ideal, since it would allow property owners to know with greater certainty the extent to which their properties are affected by the Bay Act regulations. However, given

the limited grant funding available to CBLAD, the Board did not feel it was appropriate to mandate such up-front, in-depth evaluations by local governments. The refinement at the time of site plan review is the best alternative. Rather than include language to this effect in the regulations, the Department would prefer to provide clearer guidance on this issue through a letter to all Tidewater localities.

As noted above, CBLAD is conducting research this year to refine a set of in-field indicators/protocols for use in refining the differentiation between intermittent and perennial streams. Various stakeholder groups have applauded CBLAD for undertaking this project. When the protocols are finished, they could provide a common methodology for use in any Virginia water program. The protocols will be provided to all Tidewater localities as guidance for this process, and CBLAD will provide training. However, a precise list of indicators or protocols cannot be listed in the regulations at this time because they are not completed.

Regarding the HBAV recommendation for establishment of a process to appeal local decisions on site-specific refinements of perennial stream identification, every local Bay Act program already has an appeals process in place. The Board would be reluctant to defer final adjudication of such appeals to any other agency or process and expects local governments would agree. When such appeals are filed, CBLAD staff are often asked to become involved, providing technical assistance to help resolve disputes.

Ms. McCanna's recommendation about giving the USGS maps less weight in the site-specific determination of perenniality is a good idea procedurally, but applies more appropriately to the language in 9 VAC 10-20-105.

As CBF points out, the invented word "perenniality" can be replaced with alternative terminology. (sc)

Text as originally recommended for change:

[*D. For the purpose of generally determining the perenniality of water bodies, local governments may use one of the following methods, as long as the methodology is adopted into the local program and applied consistently: (i) designation of water bodies depicted as perennial on the most recent U.S. Geological Survey 7½ minute topographic quadrangle map (scale 1:24,000); or (ii) use of a scientifically valid system of in-field indicators of perenniality. However, site-specific determinations shall be made or confirmed by the local government pursuant to 9 VAC 10-20-105.*]

Text as now recommended for change:

[*D. For the purpose of generally determining* ~~***the perenniality of***~~ ***whether*** *water bodies* ***have perennial flow****, local governments may use one of the following methods, as long as the methodology is adopted into the local program and applied consistently: (i) designation of water bodies depicted as perennial on the most recent U.S. Geological Survey 7½ minute topographic quadrangle map (scale 1:24,000); or (ii) use of a*

scientifically valid system of in-field indicators of ~~***perenniality***~~ ***perennial flow***. *However, site-specific determinations shall be made or confirmed by the local government pursuant to 9 VAC 10-20-105.*]

The Board voted unanimously to adopt these changes.

Section Reference: **9 VAC 10-20-90.B**
Subject: RMA Designation
Comments made by: The Chesapeake Bay Foundation and the Home Builders of Virginia

Comments/Issues: In this subsection, CBF continues to recommend the following change: *". . . and where mapping resources indicate the presence of* ~~*these*~~ *land types listed in items 1. through 4. below contiguous to the Resource Protection Area,* ~~*should*~~ *shall be included in designations of Resource Management Areas: . . . ."* CBF considers mandatory inclusion of these specific lands to be a necessary minimum in helping localities achieve the goals of the Chesapeake Bay 2000 Agreement regarding vital habitat protection and water quality.

The HBAV notes that this section [Note: original draft revisions] adds a provision that directs localities to include mapped RMA categories into their CBPAs. The HBAV does not consider this to be a problem. However, they believe the use of 6% slopes as an indication of highly erodible lands (as applied in Virginia Beach for RPA designation) is excessive and usually not indicative of land with a high erosion potential.

CBLAD Response: In some cases (for example, James City County), requiring in the regulations that a locality must include all the specified mapped features in their RMAs would mean that the locality would have to include its entire jurisdiction within a Chesapeake Bay Preservation Area. However, former Delegate Tayloe Murphy, the author and sponsor of the Bay Act, has made it clear that, as stated in 9 VAC 10-20-90C.5, it was not the intent of the Act to require localities to designate all lands within their jurisdictions as Chesapeake Bay Preservation Areas. Also, requiring inclusion of the mapped areas that are "contiguous" to RPAs, as the CBF proposes, would go beyond the Board's original policy position, which was developed with broad stakeholder involvement. In fact, all Tidewater localities have already designated their RMAs, and virtually all of them did so consistent with this policy language. Therefore, staff recommends that the CBF recommendation not be incorporated into the regulations.

The HBAV comment regarding the Virginia Beach definition of highly erodible soils does not have a direct bearing on the language in these regulations. (sc)

Section Reference: **9 VAC 10-20-90.C.1**
Subject: RMA designation
Comments made by: Fairfax County and The Home Builders Association of Virginia

Comments/Issues: The HBAV comments that this section adds significant new language regarding the criteria for RMAs within localities, few of which are contained in the RMA categories in section B. The new categories will be used by CBLAD in evaluating program acceptability with regard to RMA designations. The HBAV believes these new categories will significantly expand the reach of RMAs and effectively make them a water quality program for the entire locality, since all land within a locality is potentially developable or may have existing stormwater drainage systems. HBAV recommends that this provision be reevaluated.

Regarding those jurisdictions with ". . . mapping resources for only portions of their jurisdiction . . . .", Fairfax County asks for clarification on what is meant by ". . . only portions . . . ." Since Fairfax County has some areas where soils have not been mapped, would they fall under this category?

CBLAD Response: These comments by Fairfax County and the HBAV are reiterations of comments from the first comment period. The Board already chose not to make further changes to this section of the regulations based on those earlier comments.

The inclusion of all this new language in 9 VAC 10-20-90 is the result of incorporating language from the Board's RMA policy, adopted in 1991 with significant stakeholder involvement. There is no threat of the Board mandating RMA expansions based on this language. In fact, all 84 Tidewater localities have already designated their Chesapeake Bay Preservation Areas, most based on the application of this policy language. Since the Board has approved all 84 designations and local programs, they are already deemed consistent with this policy language. This language is being included in the regulations upon the recommendation of the 1992 Regulation Study Committee members, who felt that any Board policies that were being used in the review of local programs should be incorporated into the regulations. The effect of this language is more prospective, applying to other localities in the Commonwealth, but outside Tidewater Virginia, who may choose to implement a Bay Act program. The language will assure consistency of such programs with those enacted in Tidewater.

While the language referenced by Fairfax County regarding ". . . only portions . . . ." will have no future bearing on the County's CBPA designation, which has already been approved by the Board. CBLAD staff recommends that there be no further change with regard to these comments. (sc)

Section Reference: **9 VAC 10-20-90.C.4**
Subject: RMA designation
Comments made by: Fairfax County, the Home Builders Association of Virginia, and the Northern Virginia Regional Commission

Comments/Issues: Fairfax County and the HBAV note that this section now requires a locality to demonstrate how significant water quality protection will be achieved in its designation of RMAs and to explain the rationale for the same. The HBAV notes that, in

conjunction with the allowance of adoption of the DCR stormwater management criteria, this appears to move localities closer to a mandatory stormwater management program.

Fairfax County asks if this change will require the County to do anything further to demonstrate that significant water quality protection will be achieved. The County notes that CBLAD has previously explained that this will not be the case. However, they recommend that the Board ensure that these proposed revisions will not require any locality that has already had its RMA designation reviewed and approved to have to further revise this designation.

The NVRC comments that localities should not be required to demonstrate how water quality protection will be achieved within designated RMAs if all eligible RMA components are included in a local program. The suggest that it would be reasonable for the statement to read: *"Local governments shall demonstrate how water quality protection will be achieved if eligible RMA components are not designated under a local program."*

CBLAD Response: These comments reiterations of similar concerns expressed during the first comment period. The Board already chose not to make further changes to this section of the regulations based on those earlier comments.

As noted above, the inclusion of all this new language in 9 VAC 10-20-90 is the result of incorporating language from the Board's RMA policy, adopted in 1991. There is no threat of the Board mandating RMA expansions based on this language. In fact, all 84 Tidewater localities have already designated their Chesapeake Bay Preservation Areas, most based on the application of this policy language. Nor will any of the existing CBPA program need to demonstrate how significant water quality protection will be achieved, based on their current CBPA designations. Since the Board has approved all 84 designations and local programs, they are already deemed consistent with this policy language.

CBLAD staff has a concern with the additional language proposed by the NVRC. Some urban localities, especially some small cities, did not have adequate natural resource (e.g., soil) maps that identified the locations of potential RMA features. The features they could identify existed on only very limited land area, which was considered to be insufficient area to expect significant water quality protection to be achieved through implementation of the performance criteria. Inclusion of the language proposed by NVRC would have the effect of enabling such limited RMA designations and, thus, significantly limiting any water quality protection exercised by the locality. CBLAD staff recommends that there be no further changes with regard to these comments. (sc)

Section Reference: **9 VAC 10-20-90.C.5**
Subject: RMA designation
Comments made by: The Chesapeake Bay Foundation, Fairfax County, and the Home Builders Association of Virginia

Comments/Issues: The CBF reiterates its previous concern with the language of section C.5. Specifically, they perceive the language to imply that the Board does not favor the designation of jurisdiction wide RMAs. However, they believe jurisdiction wide RMAs are often the most appropriate designations, as reflected by the jurisdiction-wide designations of many Tidewater localities. They recommend that, at a minimum, this statement of policy should be removed from the regulations and instead placed as guidance in the *Local Assistance Manual*.

Fairfax County notes that, while it is appropriate for the regulations to clarify that there is no expectation for jurisdiction-wide RMA designations, the Board should not discourage or preclude such local designations. Therefore, the County recommends that this language be further revised to recognize the validity of (but not the requirement of) jurisdiction-wide RMA designations.

The HBAV perceives that this policy, while commendable, is inconsistent with the new directives contained in subsection C.4, which seem to contradict this policy.

CBLAD Response: Contrary to the HBAV opinion expressed in their comments, the Board views the requirements of proposed subsection C.4 as merely assuring that appropriate land areas and features will be considered for inclusion in RMAs and that the resulting RMAs will be large enough to result in significant water quality protection through implementation of the performance criteria. This could be achieved by an RMA designation that is less than the entire jurisdiction.

The Board also disagrees with the CBF view that the language in subsection C.5 *implies* that the Board does not favor the designation of jurisdiction-wide RMAs. This is a statement of intent, not one of "favor". The explanation behind this position is explained above under the response to CBF comments related to 9 VAC 10-20-90.B.

The Board has neither discouraged nor precluded jurisdiction-wide RMA designations and certainly recognizes that more expansive application of the program's criteria will result in more effective water quality protection. The Board has adequately demonstrated this by their approval of many local programs that designated jurisdiction-wide RMAs or applied key performance criteria jurisdiction-wide. In that vein, and in response to the NVRC recommendation, the Board could consider clarifying this statement by adding language that it does not wish to discourage or preclude more expansive designations and recognizes the added water quality protection they afford, although CBLAD staff do not consider this necessary. The Board has demonstrated this position throughout the program's short history. In that regard, the Board could consider the following additional language: (sc)

Text as initially recommended for change:

5. It is not the intent of the board, nor is it the intent of the Act or this chapter, to require that local governments designate all lands within their jurisdiction as Chesapeake Bay Preservation Areas. The extent of the Resource Management Area designation should

always be based on the prevalence and relation of Resource Management Area land types and other appropriate land areas to water quality protection.

Text as now recommended for change:

5. It is not the intent of the board, nor is it the intent of the Act or this chapter, to require that local governments designate all lands within their jurisdiction as Chesapeake Bay Preservation Areas. ***[It is also not the intent of the board to discourage or preclude jurisdiction-wide designations of Resource Management Areas when the local government considers such designations appropriate, recognizing that greater water quality protection will result from more expansive implementation of the performance criteria.]*** *The extent of the Resource Management Area designation should always be based on the prevalence and relation of Resource Management Area land types and other appropriate land areas to water quality protection.*

The Board voted unanimously to adopt this change.

Section Reference: **9 VAC 10-20-100**
Subject: IDA Criteria
Comments Made by: Arlington County and The Home Builders Association of Virginia

Comments/Issues: Arlington County commented that CBLAD's intent in the proposed regulations seems to be an overall tightening of the restrictions for encroachments into RPAs and to increase the level of active management of RPAs by local governments. The only option that appears to provide existing urban areas with adequate flexibility to address existing and proposed development seems to be to designate certain areas as Intensely Developed Areas (IDAs). However, practically all of Arlington would qualify as an IDA under the proposed criteria in 9 VAC 10-20-100. The use of an IDA overlay was considered by the County Board and rejected when our local ordinance was adopted in 1992. Attempting to change our local program at this stage would be very difficult, since it will be perceived as backsliding and caving in to development pressures. CBLAD should consider seriously whether forcing local governments to increasingly rely on IDAs is really best in terms of protecting RPAs and RMAs in existing urban areas.

The HBAV noted that this section has been changed in several minor areas. They commented that none of these changes appear to substantially modify the intent of the section. However, the HBAV believes the housing density level should be changed from four units to three.

CBLAD Response: Regarding the Arlington County comment, the proposed amendments to this section were intended to clarify the use of IDAs and their intent with regard to RPA encroachment. CBLAD is not suggesting that localities should necessarily go back and re-designate IDAs. This language change merely clarifies that redevelopment outside of IDAs cannot further encroach into the RPA nor increase impervious cover.

The HBAV is commenting on language in the original regulations that the Board did not propose to change. The Board intends that IDAs be dense, largely impervious, developed areas. Reducing the housing density, as the HBAV proposes, would mean allowing the inclusion of areas that are less dense than the standard the Board has already established. Therefore, CBLAD staff recommends that the change proposed by the HBAV not be incorporated into the regulations. (ml/sc)

Section Reference: **9 VAC 10-20-100.B and B.2**
Subject: IDA Criteria
Comments Made by: The Chesapeake Bay Foundation

Comments/Issues: The CBF recommends replacing the proposed deletion of "~~effective~~" with the word "*original"* in subsections 100.B and 100.B.2, in order to discriminate the original adoption date from the date of adoption of these proposed amendments..

CBLAD Response: Under 9 VAC10-20-100.B, a phrase (noted in italics in the following) was inserted to clarify what the Board meant regarding the time at which the conditions had to exist: *". . . provided at least one of the following conditions existed at the time the local program was adopted . . . . "* The phrase in italics essentially accomplishes what the word "effective" would have accomplished under subsection B.2. It is the intent that IDAs be based on the conditions that existed at the time a local program was first developed and adopted. In that vein, adding the word "originally" as the CBF proposes may add further clarification. (ml)

Text as initially recommended for change:

B. Local governments exercising this option shall examine the pattern of residential, commercial, industrial and institutional development within Chesapeake Bay Preservation Areas. Areas of existing development and infill sites where little of the natural environment remains may be designated as Intensely Developed Areas provided at least one of the following conditions ~~exists~~ *existed at the time the local program was adopted*: . . .

~~B.~~ *2.* Public sewer and water ~~is~~ *systems, or a constructed stormwater drainage system, or both, have been* constructed and ~~currently serves~~ *served* the area by the ~~effective~~ *local program adoption* date. This condition does not include areas planned for public sewer and water *or constructed stormwater drainage systems*;

Text as now recommended for change:

B. Local governments exercising this option shall examine the pattern of residential, commercial, industrial and institutional development within Chesapeake Bay Preservation Areas. Areas of existing development and infill sites where little of the natural environment remains may be designated as Intensely Developed Areas provided at least one of the following conditions ~~exists~~ *existed at the time the local program was* ***originally*** *adopted*: . . .

~~B.~~ *2.* Public sewer and water ~~is~~ *systems, or a constructed stormwater drainage system, or both, have been* constructed and ~~currently serves~~ *served* the area by the

~~effective~~ ***original*** *local program adoption* date. This condition does not include areas planned for public sewer and water *or constructed stormwater drainage systems*;

The Board voted unanimously to adopt these changes.

Section Reference: 9 VAC 10-20-105
Subject: Site-specific RPA/perennial stream determinations
Comments made by: The Chesapeake Bay Foundation, Fairfax County, the Home Builders Association of Virginia, the Hampton Roads Planning District Commission, Melissa McCanna, the Northern Virginia Regional Commission, and York County

Comments/Issues: Fairfax County commented that the revised language requires that a field-verified, site-specific determination of stream perenniality and RPA boundary delineation study be performed for all land development projects, regardless of how proximate the proposed project is to the RPA. The County believes there should be some allowance provided in the proposed regulations to not require such studies where it is clear that there are no conflicts with identified RPAs. The County also commented that if such in-field determinations are to be required, CBLAD will need to assist localities with the development of acceptable perennial stream identification protocols.

As noted in the comments pertaining to 9 VAC 10-20-80.D, the HBAV recommends that if the Board continues with this potentially subjective system of determining and refining the identification of perennial streams, then a technically-based entity/mechanism should be provided through which a property owner may appeal a determination. This could be accomplished by a related (objective) agency, such as the Army Corps of Engineers or DEQ, or internally by properly trained CBLAD staff.

Also as noted in the comments pertaining to 9 VAC 10-20-80.D, the HRPDC noted that in the new revisions, the proposed requirements in 9 VAC 10-20-105 to identify the boundaries of RPAs based on site-specific determinations of perennial flow in streams conflicts with the provisions in 9 VAC 10-20-80.D (alternate methods for generally determining the perennial nature of water bodies). If a locality has used USGS topographic maps to designate perennial streams and RPAs, and a landowner has purchased property believing that no perennial streams exist on his/her property but then finds that the site-specific determination reveals the actual existence of a RPA feature, his/her investment backed expectations may be disrupted, which may expose the local government to legal challenge. If this conflict is not removed, then rather than having alternatives available (as CBLAD has indicated is the intent), localities may be forced to use only the "scientifically valid system of in-field indicators of perenniality" (for which guidance/criteria have yet to be provided). Performing such studies will involve considerable time and expense. In order to eliminate the perceived inconsistency between the two sections, HRPDC recommends requiring site-specific determinations only to confirm or dispute what is indicated in the officially adopted maps under 9 VAC

10-20-80.D. In all cases, man-made stormwater drainage ditches should be excluded from the definition of perennial streams.

Furthermore, as noted in the comments pertaining to 9 VAC 10-20-80.D, the NVRC notes that the intent of the phrase ". . . site-specific determinations shall be made or confirmed by the local government pursuant to 9 VAC 10-20-105. . ." needs to be made more explicit. Based on the 8/28/2001 meeting with CBLAD staff, the NVRC staff and localities understands the phrase to mean that the CBPA map is not an official zoning map and therefore does not require a vote by the governing body every time an adjustment is made. Rather, the map is simply a guide that will change based on an actual field study of the perennial nature of the stream in question. Furthermore, NVRC staff understands that a site-specific determination is required regardless of the original methodology used in mapping RPAs (e.g., using the USGS topographic maps). Many localities and developers, however, have assumed that the CBPA map <u>is</u> a zoning map and not subject to adjustments based on field surveys. Further, many localities do not currently require a site-specific determination, and many developers are likely to be surprised by the requirement. NVRC staff strongly recommends that language be added to clarify the intent of this requirement.

York County comments that it will require assistance, training and staff to determine the perenniality of every stream in the County and then revise its CBPA map that is currently based on the USGS topographic maps. The County believes this requirement will have far reaching consequences, since many County streams and ditches that were previously intermittent have become perennial due to upstream development.

Melissa McCanna comments that adding a requirement for site-specific determinations (in 9 VAC 10-20-105) is a positive step, but more guidance is needed about such determinations, based on the best available science. She recommends that the language be further revised to state that determinations of perennial flow based on USGS maps will be given the least weight and that other mechanisms for these determinations, such as drainage area, be given higher priority.

The CBF noted that the term "perenniality" is not a word found in the dictionary used by the Code Commission as a reference for terms in Virginia regulations and should be replaced with terminology composed of dictionary-referenced words.

CBLAD Response: Regarding Fairfax County's concern about the need for such site-specific determinations depending upon the proximity of RPA features of the site, a key issue is the recognition of water bodies that have <u>not</u> been identified as perennial in the initial designation but that are, in fact, perennial. In such cases, the RPA boundary would have to be extended consistent with the requirements of 9 VAC 10-20-80.

As noted above, CBLAD is conducting research this year to refine a set of in-field indicators/protocols for use in refining the differentiation between intermittent and perennial streams. Various stakeholder groups have applauded CBLAD for undertaking this project. When the protocols are finished, they could provide a common methodology

for use in any Virginia water program. The protocols will be provided to all Tidewater localities as guidance for this process, and CBLAD will provide training. However, a precise list of indicators or protocols cannot be listed in the regulations at this time because they are not completed.

As noted above, in the response to comments on 9 VAC 10-20-80.D regarding the HBAV recommendation for establishment of a process to appeal local decisions on site-specific refinements of perennial stream identification, every local Bay Act program already has an appeals process in place. The Board would be reluctant to defer final adjudication of such appeals to any other agency or process and expects local governments would agree. When such appeals are filed, CBLAD staff are often asked to become involved, providing technical assistance to help resolve disputes.

Based on the current regulatory language, as also noted above, CBLAD observes among localities various levels of reliance of the USGS maps as the baseline for identifying perennial streams. The Board's clear intention is that RPAs be designated adjacent to waters with perennial flow. This includes man-made ditches with perennial flow, because at any point in time the constant flow provides the means for pollution entering the ditch to be carried into nearby tributaries and, ultimately, to the Chesapeake Bay. CBLAD observes very uneven use among localities of the USGS maps as the baseline for identifying perennial streams. The Board's clear intention is that RPAs be designated adjacent to waters with perennial flow. This includes man-made ditches with perennial flow, because at any point in time the constant flow provides the means for pollution entering the ditch to be carried into nearby tributaries and, ultimately, to the Chesapeake Bay.

However, some localities insist that the USGS map designation must prevail, even if site evaluations prove a contrary result. Some localities have been willing to recognize challenges to the USGS map indication if the result were a smaller RPA on a site, but not if the result were an expanded RPA. This is the problem with HRPDC's recommendation to only require site-specific determination to resolve disputes pertaining to the local CBPA maps. If a property owner has, in fact, a perennial stream on his/her property but the map shows it as intermittent (no RPA), he is not likely to dispute the map. Therefore, disputes are likely to result only in instances of reducing RPAs due to findings of intermittent rather than perennial flow. This is contrary to the Board's intent, and such inconsistencies have generated many complaints from both citizens and local governments for clearer direction from the Board and a fairer process more consistently applied.

The NVRC comment has been addressed above in the response to comments on 9 VAC 10-20-80.D. CBLAD staff recognize York County's concern about the need for technical assistance and the cost to proactively evaluate their entire stream system to determine where perennial flow really exists. Perhaps this is an issue to which priority can be given for upcoming CBLAD annual financial assistance grants. It is worthy of note that some localities (most notably the City of Williamsburg and Henrico County) have already conducted such evaluations.

Ms. McCanna's recommendation about giving the USGS maps less weight in the site-specific determination of stream flow characteristics is a good idea, but CBLAD staff consider this point more appropriate for inclusion in upcoming guidance.

Alternative terminology will be inserted to replace the non-word "perenniality." (sc)

Text as initially recommended for change:

[~~*Local governments may exercise judgement in determining site-specific boundaries of Chesapeake Bay Preservation Area components and in making determinations of the application of this chapter, based on more reliable or specific information gathered from actual field evaluations of the parcel, in accordance with plan of development requirements in subdivision 1 e of 9 VAC 10-20-231.*~~

Local governments shall, as part of their plan-of-development review process pursuant to 9 VAC 10-20-231 1 e or during their review of a water quality impact assessment pursuant to 9 VAC 10-20-130 6, ensure or confirm that site-specific determinations are made of stream perenniality and Resource Protection Area boundaries on the development site, based on reliable, specific information gathered from actual field evaluations of the site. Local governments may accomplish this by either conducting the site evaluations themselves or requiring the person applying to use or develop the site to conduct the evaluation and submit the required information for review.]

Text as now recommended for change:

[~~*Local governments may exercise judgement in determining site-specific boundaries of Chesapeake Bay Preservation Area components and in making determinations of the application of this chapter, based on more reliable or specific information gathered from actual field evaluations of the parcel, in accordance with plan of development requirements in subdivision 1 e of 9 VAC 10-20-231.*~~

Local governments shall, as part of their plan-of-development review process pursuant to 9 VAC 10-20-231 1 e or during their review of a water quality impact assessment pursuant to 9 VAC 10-20-130 6, ensure or confirm that ***(1) a reliable,*** *site-specific* ~~***determinations***~~ ***evaluation*** ~~***are made of stream perenniality***~~ ***is conducted to determine whether water bodies on or adjacent to the development site have perennial flow,*** *and* ***(2)*** *Resource Protection Area boundaries* ***are adjusted, as necessary,*** *on the* ~~***development***~~ *site, based on* ~~***reliable, specific information gathered from actual field evaluations***~~ ***this evaluation*** *of the site. Local governments may accomplish this by either conducting the site evaluations themselves or requiring the person applying to use or develop the site to conduct the evaluation and submit the required information for review.*]

The Board voted unanimously to adopt these changes.

Section Reference: **9 VAC 10-20-110.D**
Subject: General Criteria

Comments made by: The Chesapeake Bay Foundation

Comments/Issues: The CBF comments that replacement of "~~and~~" with "or" is inconsistent with the Act's requirements that local governments incorporate these criteria (even if by reference) into their comprehensive plans, zoning ordinances and subdivision ordinances. CBF proposes the following alternative language: *"Local governments shall incorporate . . . plans, zoning ordinances and subdivision ordinances ~~or~~ and may incorporate into such other ordinances and regulations as may be appropriate. . . ."*

CBLAD Response: Local land use ordinances and comprehensive plans serve different purposes. The comprehensive plan establishes land use policies and goals for the community, where as the ordinances apply various kinds of regulations and requirements to, ideally, implement those policies and achieve the goals. CBLAD staff understands that the purpose of the language in the Act referenced by the CBF is to require localities to integrate various requirements of the regulations into the *appropriate* local plans and ordinances. For example, even though local erosion and sediment control ordinances are not specifically mentioned in the Act, Tidewater localities have amended them to integrate the 2,500 square foot land disturbance threshold and other E&S control criteria set forth in the regulations. These E&S provisions are not appropriate for inclusion in subdivision or zoning ordinances.

The intention of this change is not to give localities a choice of amending either their comprehensive plan, their zoning ordinance or their subdivision ordinance to incorporate the regulatory requirements, but to incorporate the requirements into the appropriate documents among those, as well as other land use ordinances and regulations they may have. This is what the Tidewater local governments have already done, and the Board has already approved their local programs. Therefore, CBLAD staff considers the proposed language to be appropriate without further change. (sc)

However, Board members agreed that the Act requires incorporation into subdivision ordinances, but want to assure the language allows for stand-alone ordinances. They instructed staff to make further changes to accomplish this, consistent with the CBF recommendation and stated they will review these prior to consideration of adopting final regulation amendments at their December 10, 2001 quarterly meeting.

Text as initially recommended for change:

D. Local governments shall incorporate the criteria in this part into their comprehensive plans, zoning ordinances, subdivision ordinances, [*~~and~~ or*] *such other* [*~~police and zoning powers~~ ordinances and regulations*] *as may be appropriate, in accordance with §§ 10.1-2108 and 10.1-2111 of the Act and Parts V (9 VAC 10-20-170 et seq.), VI (9 VAC 10-20-181 et seq.), and VII (9 VAC 10-20-211 et seq.) of this chapter. The criteria may be employed in conjunction with other planning and zoning concepts to protect the quality of state waters.*

Text as finally recommended for change:

D. Local governments shall incorporate the criteria in this part into their comprehensive plans, zoning ordinances ***[, and]*** *subdivision ordinances,* [~~*and*~~ ~~***or***~~ ***and may incorporate the criteria in this part into***] *such other* [~~*police and zoning powers*~~ *ordinances and regulations*] *as may be appropriate, in accordance with §§ 10.1-2108 and 10.1-2111 of the Act and Parts V (9 VAC 10-20-170 et seq.), VI (9 VAC 10-20-181 et seq.), and VII (9 VAC 10-20-211 et seq.) of this chapter. The criteria may be employed in conjunction with other planning and zoning concepts to protect the quality of state waters.*

Section Reference: **9 VAC 10-20-120**
Subject: General Criteria
Comments made by: The Virginia Association of Counties

Comments/Issues: VACO comments that they see no reason to make the proposed language change suggesting the "Local governments must ensure that any use, development or redevelopment of land in the Chesapeake Bay Preservation Areas meets the following performance criteria . . . ." VACO states that while local governments can "require" that their laws be obeyed, it is asking too much for the to "ensure" obedience. VACO suggests that it would be more appropriate here to state that local governments must "require" compliance. They suggest the following alternative language: "*Through their applicable ordinances and their enforcement, local governments shall require that any proposed use, development or redevelopment of land in Chesapeake Bay Preservation Areas meets the following criteria: . . .*"

CBLAD Response: CBLAD staff has no objection to the alternative language proposed by VACO. It accomplishes the same objective as that originally proposed. (sc)

Text as initially recommended for change:

~~It~~ *Local governments* must ~~be demonstrated to the satisfaction of local governments~~ *ensure* that any use, development or redevelopment of land in Chesapeake Bay Preservation Areas meets the following performance criteria: . . . .

Text as now recommended for change:

~~It~~ ***Through their applicable land use ordinances, regulations and enforcement mechanisms,*** ~~***Local***~~ ***local*** *governments* ~~must be demonstrated to the satisfaction of local governments~~ ~~***ensure***~~ ***shall require*** that any use, development or redevelopment of land in Chesapeake Bay Preservation Areas meets the following performance criteria: . . . .

The Board voted unanimously to adopt these changes.

Section Reference: **9VAC 10-20-120.1, 120.2, and 120.5**
Subject: Performance Standards – clarification wording
Comments made by: Sierra Club (Falls of the James Chapter)

Comments/Issues: The Sierra Club commented, as follows: "9 VAC 1-20-120 Page 6, Line 51, General performance criteria. Page 7, Line 1 No more land shall be disturbed than is necessary to provide for the 'proposed' versus 'desired' use or development. Line 3 Indigenous vegetation shall be preserved to the maximum extent 'practical' versus 'possible', with added 'consistent with development proposed'. - - we're talking about redevelopment in the Resource Protection Area here. If we intent (sic) to protect the waters of the state, we must give the regulation teeth needed for protection, not the teeth needed for redevelopment."

CBLAD Response: The changes in the wording of general performance standards #1 (land disturbance), #2 (preserving vegetation), and #5 (minimizing impervious coverage) were each created in response to problems in the interpretation and application of these general standards by localities. The wording was in the draft amendments proposed for the first public comment period, which was the draft of the amendments approved by the Board considered by the Board as long ago as 1997. There were no comments raised on the proposed wording during the first public comment period.

The performance standards apply throughout Chesapeake Bay Preservation Areas, including development and redevelopment activities in both RPAs and RMAs. Also, by definition, redevelopment would occur on sites (both within IDAs and in isolated redevelopment sites) where vegetation is virtually non-existent and the majority of the site is already impervious. Accordingly, staff does not recommend that there be changes to these sections based upon the cited comments. (dk)

Section Reference: **9VAC 10-20-120.7a&b**
Subject: General Performance Criteria Related to On-site Sewage Treatment Systems
Comments made by: The Virginia Association of Counties (VaCo), Henrico County, the Sierra Club, the Chesapeake Bay Foundation, York County, Fairfax County, and the Home Builders Association of Virginia

Comments/Issues: The Virginia Association of Counties believes the provisions in this paragraph pertaining to on-site sewage treatments systems transfer a major regulatory responsibility to local governments in a manner they believe to be highly inconsistent with the Chesapeake Bay Preservation Act. VACO points out that, while section 15.2-2157 of the Code of Virginia provides local governments with the option of regulating the installation, maintenance, and operation of on-site sewage treatment facilities, there are no statutory mandates anywhere in the Code requiring local governments to assume this responsibility. Since no statute imposes this mandate upon localities, neither should be proposed by regulations. Section 32.1-164.A of the Code of Virginia clearly assigns the State Board of Health the responsibility for the "supervision and control over the safe and sanitary collection, conveyance, transportation, treatment, and disposal of sewage; all

sewage systems, and treatment works (which, by definition, includes septic tanks) as they affect the public health and welfare." This same section of the Code also provides that the Board of Health "shall exercise due diligence to protect the quality of both surface and ground water." While some counties have assumed responsibility for regulating on-site sewerage systems under authority granted in 15.2-2157 of the Code, others have declined to perform this function because of the administrative and financial burdens such responsibility would impose.

Although recognizing that this subsection offers more flexibility to owners of septic systems with the alternative of installing a plastic filter as an option to the mandatory pump-out, Henrico County believes there are better and more effective ways in the new Virginia Department of Health's (VDH) sewage handling and disposal regulations of limiting the need for pump-out. The County does not support the proposed alternative. At best, they believe any one of these alternatives might delay the need for pump out, but not eliminate the need. They consider these options to be a step backward.

An additional option has been included in this section (7 a.2) that allows owners of on-site treatment systems to submit documentation every five years, certified by a sewage handler permitted by the health department, that the septic system has been inspected and does not need pumping. This seems to relieve some of the expense to the homeowner for the pumping. However, Henrico County believes there should be some means of verifying the handlers' assessments. The local health department certifies or permits these sewage handlers, and it seems reasonable that the handlers' documentation would be submitted to the health department.

While some areas of the State have used diversion devices with success, the VDH has not adopted these across the Commonwealth. A system is designed based on the anticipated wastewater flow – as related to the design of the residence or proposed use of the facility – and the estimated percolation rate of the soils. To allow a system a down time on a scheduled basis is good for the system, but, in this proposal, the system would be overloaded and might experience problems functioning properly. Henrico County does not support the proposed change.

The Sierra Club considers the plastic filter technology to be too new, and the risk too high, with failing septic systems in many Chesapeake Bay counties, to risk endangerment to our ground water. They prefer the Board to allow the existing rules to work. If filters are later proven to be effective, then they can be added through a later amendment process.

CBF continues to oppose the use of a plastic filter as an alternative to the pump out provision (subsection 7). They consider the pump out provision to be the most effective means for preserving the functionality of septic systems, particularly older ones. They agree that the plastic filter is an effective means for removing bio-solids from the waste stream and recognize that many health districts mandate plastic filters on all repairs of existing systems. However, they suggest that the filter be required for all new and repaired systems in addition to the required pump out.

York County has a functioning septic tank pump-out program. However, they believe the enforcement of septic tank regulations is more appropriately the role of the Virginia Department of Health and should be transferred accordingly.

Fairfax County notes that the revised regulations would provide localities with two options for alternatives to the mandatory 5-year pump-out. The first option would allow the installation of a plastic filter on the outlet of the septic tank. The State Sewage Handling and Disposal Regulations (12 VAC 5-610-817.Maintenance) require all septic systems constructed after July 1, 2000 to be equipped with an inspection port or an effluent filter or a reduced maintenance septic tank. However, the County agrees with the CBF that allowing a filter to be installed in lieu of regular pump-out may not be the best course of action. The theory is that the filter will clog, forcing the owner to call a pump-out contractor. There are many stories about contractors pumping the tank and telling the owner he has found the problem. The contractor proceeds to tell the owner to remove the filter and he won't have this problem again. The filter is potentially a good thing when used and maintained correctly. The second option allows owners of on-site septic systems to submit documentation from licensed sewage handlers certifying that septic systems have been inspected, are functioning properly, and the tank does not need to have the effluent pumped out of it. Although the tank may not need to be pumped out at the time the inspection is made, the available capacity of the tank is reduced and it becomes more likely that the tank will fail or need to be pumped out prior to the next inspection in 5 years. Local jurisdictions still need to require a regular maintenance schedule. While County staff sees potential problems with each of the options described above, County staff does not oppose these provisions provided that they remain a local option and not a requirement.

The HBAV state that this section includes minor changes to the performance criteria that do not substantially change its intent and adds new provisions concerning on-site sewage treatment systems. This would impact the shelter industry in rural localities, large lot subdivisions on septic tanks and in urbanizing localities in which sewer systems have not yet reached new subdivisions. The HBAV believes that CBLAD is treading on the territory of the State Department of Health, which possesses the expertise and authority required in this area. An Attorney General's opinion exists which prohibits differing sewage handling and disposal regulations for different parts of the state, only one standard is allowed. HBAV believes CBLAD is overstepping its authority in trying to establish differing standards for septic systems within the area under the jurisdiction of the CBPA. Some of the specific language in the regulation pertaining to septic systems would be better contained in the CBLAD Local Assistance Directory.

CBLAD Response: - - Under the proposed regulations, pump-out of on-site septic systems not requiring Virginia Pollution Discharge Elimination System (VPDES) permits remains mandatory. The plastic filter and inspection certification provisions contained in the proposed amendments are merely options available to the local governments – neither is a mandatory program element.

The commentors also question the applicability of the Chesapeake Bay Preservation Area Designation and Management Regulations requiring maintenance of septic systems, systems that are more routinely considered under the purview of the Virginia Department of Health. There are currently no maintenance requirements in VDH regulations for septic systems serving single-family homes. Failing septic systems are widely recognized as being significant contributors to the degradation of both ground and surface water, and until the VDH regulations are amended so as to shift management of the issue to the Department of Health, CBLAD contends that the management requirements contained in the existing and proposed CBPA Designation and Management Regulations are necessary and appropriate.

Comments similar to these were submitted during the earlier public comment period and have already been addressed. It is important to note (1) CBLAD has no authority over any other state agency to require it to implement and enforce provisions of the Bay Act regulations; and (2) the Bay Act was intended to be supplementary to other water quality protection programs (§10.1-2113 of the Code of Virginia). This supplementary authority enables the Board to address water quality problems and issues that are not adequately addressed under related programs of other agencies.

Regarding Health Department authority and the Attorney General's opinion about septic system regulations, the opinion related to the VDH sewage handling regulations only. It stated that the authority for that set of regulations limited them to having a single set of standards that must apply state-wide, rather than different standards that might apply in different regions of the state. The AG opinion has no bearing on the Bay Act regulations. As stated previously, the reason these regulations address septic system maintenance is that it is the source of potentially critical water quality problems and is not addressed at all in the current VDH regulations. CBLAD is participating in the process to amend the VDH regulations to include system maintenance requirements. If these are eventually adopted into the VDH regulations, it is highly likely that the CBLAB will rescind the requirements from the Bay Act regulations.

Regarding questions about the effectiveness of the proposed optional methodologies, there have indeed been numerous comments during both comment periods reflecting legitimate concerns about the methodologies and significant misunderstanding about the potential impact of their implementation. To date, CBLAD staff have not heard that a single local government is interested in implementing either the plastic filter option or the alternating drainfield option. Localities are concerned about the additional burden of having to track implementation and notify landowners when to switch the valves to the alternate drainfields. In that regard, the Board might consider rescinding these two options, but maintaining the option agreed upon with the General Assembly, to allow for inspections in lieu of pump-outs, as specified. However, CBLAD staff recommend no further changes in response to these comments. (lt/sc)

Section Reference: **9VAC 10-20-120.8**
Subject: Stormwater Performance Standards – Performance Language Removed
Comments made by: Sierra Club (Falls of the James Chapter)

Comments/Issues: The Sierra Club would like the Board to retain the deleted language in 9VAC 10-20-120 8 pertaining to the criteria for stormwater management. The language states that, "Stormwater Management criteria which accomplish the goals and objectives of this chapter shall apply. For development, the post-development nonpoint source pollution runoff load shall not exceed the pre development load based upon the average land cover conditions. Redevelopment of any site not currently served by water quality best management practices shall achieve at least a 10% reduction of nonpoint source pollution in runoff compared to the existing runoff load from the site. Post development runoff from any site to be redeveloped that is currently served by water quality best management practices shall not exceed the existing load of nonpoint source pollution in surface runoff." This statement has been replaced with the following, "Stormwater management criteria consistent with the water quality protection provisions (4VAC 3-20-71 et seq.) of the Virginia Stormwater Management Regulations (4 VAC 3-20-10 et seq.) shall be satisfied."

CBLAD Response: The intention of replacing this language with a reference to the water quality standards provided in the Virginia Stormwater Management Regulations is to consolidate and reference a single stormwater quality standard to be used statewide for development and redevelopment sites. The new DCR Stormwater Quality Standards are essentially the same as those in the original Bay Act regulations (the language being replaced in this subsection) and will have the same net effect. To prevent any confusion in the future, the Board considered it best to streamline this reference and direct the regulated public to the technical standards contained within the Virginia SWM Regulations, which all Virginia stormwater management programs have agreed to use. Therefore, CBLAD staff recommend no further changes in response to this comment. (db)

Section Reference: **9VAC 10-20-120.8**
Subject: VPDES permit equivalency with stormwater standards
Comments made by: The Chesapeake Bay Foundation and the Hampton Roads Planning District Commission

Comments/Issues: The CBF states that in 9 VAC 10-20-120 8.a.(2)&(3), VPDES permits issued to local governments for storm sewer discharges should be identified as "individual" permits. The HRPDC states that this subsection of the regulations referencing water quality standards needs to be clarified to indicate that equivalency should only apply to Municipal Separate Storm Sewer discharge permits or construction general permits of the VPDES program. They ask whether (1) a local Bay Act program satisfies the VPDES MS4 permit requirements or vice-versa; and (2) which agency has the lead in coordinating Virginia's various stormwater management programs?

CBLAD Response: Regarding the CBF comment, since (1) the Board has purview and review authority over which programs are determined to be implementing equivalent water quality protection, and (2) the Department of Environmental Quality tends to favor the issuance of blanket general permits rather than individual permits for municipal separate storm sewer systems, CBLAD staff feel that the Board and the Department's scrutiny over this option to satisfy the stormwater management criteria is sufficient, even for general permits. The proposed criteria requires a specific determination of equivalency by the Board, and is normally considered a major program modification.

Regarding the HRPDC comments and questions, the clarifications provided in the regulations are intended to indicate that if a locality chooses to implement water quality criteria which accomplish the same desired pollutant reduction through a vehicle other than their Chesapeake Bay Preservation Act program, such as a VPDES MS4 program, then they are allowed to do so, provided the Board has reviewed such a request and found the locality to be implementing equivalent measures to what is minimally required by the Bay Act regulations. Several localities have adopted comprehensive revisions of their stormwater management programs, resulting in municipal regional stormwater programs that provide equivalent water quality protection through a different control approach than on-site BMPs. This is encouraged and the language revisions are intended to be supportive of such efforts. The equivalency provision is not intended to be extended to VPDES construction general permits, as the statewide general construction permits do not, in practice, require that permittees address post-construction stormwater pollutant loadings through the application of stormwater management BMPs, as is required by the Bay Act regulations. Therefore, these permits do not achieve equivalent stormwater management results.

With regard to the interchangeability of the VPDES MS4 requirements and the Bay Act pollutant removal requirements, they are not, as currently outlined, interchangeable. While they may require similar management practices, the VPDES MS4 permit requirements affect only MS4's within Urban Areas as designated by the census, and the CBPA water quality requirements affect only Chesapeake Bay Preservation Areas. While there may be overlaps between these areas, they are two distinct and separate overlays that many localities have chosen to keep separate. The VPDES MS4 program is a flexible program based on a wide variety of BMP options that localities may choose to implement. However, the lack of definitive performance requirements in the VPDES program makes a broad, default programmatic determination of equivalency impossible. However, both CBLAD and DEQ are very willing to coordinate efforts with those localities wishing to demonstrate, through a technical analysis, that one program meets the requirements of the other.

With regard to the final question about who is the lead agency in dealing with stormwater management, we have no clear answer. The Department of Environmental Quality is clearly the leader in regard to point source issues and the review and issuance of VPDES permits. The Department of Conservation and Recreation is the lead with regard to Erosion and Sediment Control Issues. DCR is additionally responsible for administering the voluntary Virginia Stormwater Management Regulations and associated technical

standards. The Chesapeake Bay Local Assistance Department is responsible for ensuring that the water quality protection criteria and objectives defined in the Act and regulations are met in the 84 Tidewater Virginia localities, through whatever vehicle a locality chooses to use. The staff of these three agencies coordinate to a large degree to ensure that the application of these standards is as uniform and coherent as possible, given the great desire by localities and the regulated public for flexibility, various compliance options, local discretion over programmatic structure, and the lack of a mandatory and uniform statewide mandate. Therefore, CBLAD staff recommend that there be no further changes to the regulations in response to these comments. (db)

Section Reference: **9VAC 10-20-120.8**
Subject: Stormwater Management Criteria – Incorporation of Va. SWM Regulations water quality provisions by reference
Comments made by: The Home Builders Association of Virginia

Comments/Issues: The HBAV wants the Board to clarify that DCR will not enforce the stormwater management criteria in Tidewater Virginia (once the regulations have incorporated the technical standards from the Virginia Stormwater Management Regulations pertaining to water quality).

CBLAD Response: The DCR has indicated that they do not intend to assume enforcement over the implementation of the stormwater criteria adopted pursuant to the Chesapeake Bay Preservation Act in Tidewater localities, once the technical standards referenced in the Virginia Stormwater Management Regulations have been incorporated by reference. CBLAD does not yet have a formal Memorandum of Understanding detailing our mutual roles in implementing these criteria. However, on several occasions CBLAD has indicated and DCR has concurred that, while the Virginia Stormwater Management Regulations are voluntary, these technical standards are being adopted for the purposes of satisfying the Chesapeake Bay Preservation Act. Therefore, the Chesapeake Bay Local Assistance Board will still maintain programmatic review authority to review local program adoption and implementation. The intent of the revision is to maintain consistency with a single unified set of technical criteria for the regulation of stormwater in Virginia. Therefore, CBLAD staff recommend no further changes in response to this comment. (db)

Section Reference: **9VAC 10-20-120.8**
Subject: Technology Standards for Best Management Practices
Comments made by: Ms. Melissa McCanna

Comments/Issues: Ms. McCanna states the opinion that technology standards are known to be ineffective and inefficient policy measures because new technologies often render the standards obsolete, and newer standards may make the regulated technology standards economically inefficient.

CBLAD Response: In relation to stormwater management, the technology standards are offered as an optional approach, and the performance-based method of

analysis is still valid and allowed. In addition, the incorporation by reference of the Virginia Stormwater Management Regulations for all of Virginia's stormwater related efforts will mean that the single set of State technical standards can be revised, updated and disseminated to keep pace with technology. Therefore, CBLAD staff recommend no further changes in response to this comment. (db)

Section Reference: **9VAC 10-20-120.8**
Subject: Equivalency of Alternative Local Stormwater Management Programs with Water Quality Provisions of the Virginia SWM Regulations
Comments made by: Fairfax County, Virginia

Comments/Issues: Fairfax County employs a different stormwater management BMP approach that requires a uniform percent Phosphorus removal requirement throughout most of the County. It is the County's view that they should be allowed to continue this approach, which was determined to be equivalent to the standard methodology provided by the Department and was therefore previously approved by the Board.

CBLAD Response: The incorporation by reference of the water quality criteria from the Virginia Stormwater Management Regulations is intended to encourage localities to adopt the standards contained therein for uniformity. However, the option for localities to implement a locally-adopted regional stormwater management program reviewed and found by the Board to provide equivalent water quality protection is still a program option. While we would expect that localities will look to the technical criteria in the Virginia Stormwater Management Regulations and Handbook to stay current with stormwater engineering practice and design information, localities still have some degree of flexibility due to the above-referenced provision for equivalent programs. The Board still has purview with respect to consideration of alternate local programs. Since the referenced DCR stormwater quality standards are essentially identical to the current Bay Act standards, CBLAD does not anticipate that local stormwater programs that were previously approved (and determined specifically to be equivalent to the performance-based approach provided in the Local Assistance Manual) would have to make any significant revisions as a result of these regulations. Therefore, CBLAD staff recommend no further changes in response to this comment. (db)

Section Reference: **9VAC10-20-120.9**
Subject: Agriculture
Comments made by: The Chesapeake Bay Foundation, Fairfax County, the Northern Virginia Soil and Water Conservation District, and the Virginia Association of Counties

Comments/Issues: The CBF and the NVSWCD strongly object to the changes in this subsection, declaring them as a step backward. CBF agrees that plans should not be required for their own sake; however, they want the regulations to require that all plans must be fully implemented, in light of the failure of most farmers to meet the original 1991 deadline in the regulations for completing such plans. Furthermore, the CBF states

that the regulations should include requirements for compliance with other state laws, such as the one requiring nutrient management plans for poultry operations..

The NVSWCD argues that assessments will take just as long to complete as full plans, but without achieving the same level of awareness and environmental protections. They suggest that assessments could be made optional where appropriate, but that the process not be mandated across all localities.

The VACO believes this subsection is vague about whether the local government is expected to develop the required conservation plans and evaluate the consistency of recommended additional conservation practices with the USDA-NRCS Field Office Technical Guides. VACO further recommends that this subsection be changed to place the responsibility for developing and obtaining approval of a conservation plan on the land owner or operator, rather than requiring the local government to assure that this is done.

CBLAD Response: The CBLAD agricultural work group, consisting of SWCD staff involved in the plan development process, recommended the assessment approach to improve the efficiency of the agricultural program. In addition, an agricultural subcommittee of the Board's regulatory advisory committee, including representatives of the Farm Bureau, the Virginia Agribusiness Council, and SWCD Directors and staff, endorsed this approach. With the involvement of our natural resource partners and stakeholders, CBLAD is developing guidance regarding the assessments to assure that the process that meets the regulatory requirements and provides economies over the current plan development process. The assessment process should enable the conservation planner to spend more time with farmers/landowners whose environmental constraints require more in-depth conservation analysis. If the NVSWCD wants to continue developing complete plans from scratch, they may certainly do that. However, CBLAD staff is reluctant to back away from this process, since it was carefully thought out, thoroughly discussed by key stakeholders, and achieved broad support.

One clarification may be helpful, however. This process is intended to result in the same level of conservation planning as is currently being conducted. The change to an assessment process should not be interpreted to mean that "plans" will no longer be required or developed, since they will be. Where a landowner has not been involved with prior conservation planning, all the plan components will need to be addressed, just as they are through the current process. Once a plan is developed – whether through the full planning process or an assessment process that references existing plan components – the landowner will be held accountable for the same levels of implementation, depending on whether or not there will be buffer encroachments. However, CBLAD staff will suggest some minor word changes that may provide more flexibility on this issue.

Additionally, part 9VAC10-20 –130.5.a.4 states ". . . If specific problems are identified pertaining to agricultural activities which, in the opinion of the local soil and water conservation district board, are causing pollution of the nearby tributary stream or violate performance standards pertaining to the vegetated buffer area, such problems must be

corrected . . . . " illustrates that the intent of the regulations to correct water quality problems, remains the same.

Regarding the CBF's comment that the regulations should require implementation of all plans, including plans written on RMA lands, the CBLAD feels that the assessment option should reveal imminent water quality concerns and that the local SWCDs will be able to exercise their persuasive influence, as they have done with some success in the past, to achieve voluntary implementation of any necessary BMPs on these lands. However, in response to public comments from the first comment period, the Board decided that to include stricter requirements for agriculture would not be consistent with the intentions specified in the Notice of Intended Regulatory Action originally filed for this regulatory process. The Board has indicated that they plan to continue to track agricultural pollution issues and the effectiveness of programs in place to combat the pollution. If necessary, they may consider further amendments related to agriculture in a future regulatory action.

Regarding the CBF comment about coordination with other related laws and regulations, the Bay Act program, as currently constituted, would take into account efforts to comply with related laws and regulations as potentially equivalent compliance with these regulations. As noted above, however, in response to public comments from the first comment period, the Board decided that to include stricter requirements for agriculture would not be consistent with the intentions specified in the Notice of Intended Regulatory Action originally filed for this regulatory process.

Regarding VACO's comments, each locality has the opportunity, via the local technical review committee process, to review the applicability and appropriateness of any recommended BMPs with technical experts representing Virginia Cooperative Extension, DCR, and NRCS. However, the Board views local SWCDs as local government subdivisions too, and the districts have been the local entity through which much of the agricultural program has been implemented. Districts asked for the responsibility to work with landowners to develop and approve the required conservation plans and to assist in the review and development of new standards and practices. CBLAD foresees SWCDs continuing to fill these roles. However, the SWCDs have no inherent enforcement authority nor experience. Enforcement of agricultural violations is a local government responsibility, and has been all along. The MOUs between local governments and their SWCDs are clear about the divisions of responsibilities and expected interactions. Local governments could view SWCDs as their primary agents for accomplishing the agricultural conservation planning requirements.

However, CBLAD does not consider it appropriate to change the language in the regulations to shift the responsibility for agricultural plans directly to land owners and/or operators. These regulations apply to local governments, not directly to citizens. The regulations are set up to require the locality to pass the requirements on to the general public through their comprehensive plans and land use ordinances and regulations. Again, in the context of agricultural plan requirements, the SWCDs are the entities that are assisting in the development of the required plans and approving them. (rw/sc)

Text as initially recommended for change:

9. Land upon which agricultural activities are being conducted, including but not limited to crop production, pasture, and dairy and feedlot operations, *or lands otherwise defined as agricultural land by the local government,* shall have a soil and water quality conservation ~~plan. Such a plan shall be based upon the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resource Soil Conservation Service and accomplish~~ *assessment conducted regarding the effectiveness of existing practices pertaining to soil erosion and sediment control, nutrient management, and management of pesticides to ensure that* water quality protection *is being accomplished* consistent with the Act and this chapter. ~~Such a plan will be approved by the local Soil and Water Conservation District by January 1, 1995.~~

Text as now recommended for change:

9. Land upon which agricultural activities are being conducted, including but not limited to crop production, pasture, and dairy and feedlot operations, *or lands otherwise defined as agricultural land by the local government,* shall have a soil and water quality conservation ~~plan. Such a plan shall be based upon the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resource Soil Conservation Service and accomplish~~ *assessment conducted* ~~***regarding***~~ ***that evaluates*** *the effectiveness of existing practices pertaining to soil erosion and sediment control, nutrient management, and management of pesticides****, and, where necessary, results in a plan that outlines additional practices necessary*** *to ensure that* water quality protection *is being accomplished* consistent with the Act and this chapter. ~~Such a plan will be approved by the local Soil and Water Conservation District by January 1, 1995.~~

The Board voted unanimously to adopt these changes.

Section Reference: **9 VAC10-20-120.10**
Subject: Silviculture
Comments made by: The Chesapeake Bay Foundation

Comments/Issues: The CBF states their concern developers clearing tracts of land under the guise of timber harvesting (requiring no local government permits or approvals), when in fact they are preparing the tracts for development, minus the forested buffer area, which is often cut down as well. They are also concerned about loggers who are cutting trees and disturbing the land surface, even within a 25-foot wide Streamside Management Zone required by Forestry BMPs. The CBF supports the proposed language in 9 VAC 10-20-130.3.b that requires the reestablishment of the full 100-foot buffer when the land use changes from forestry or agriculture to other uses, such as development. However, they still believe that silvicultural activities should be required by the regulations to implement BMPs.

CBLAD Response: CBLAD staff will convey the CBF's support for this provision to the Board. In addition, two new provisions in the regulations should help to greatly curtail the clearing of forest land under the guise of silviculture. First, there is a proposed

definition of "silvicultural activities", with its twenty-acre tract size criteria. Second, there is a proposed new requirement in 9 VAC 10-20-130.3.b to reestablish the full buffer when the land use is converted from agriculture or silviculture to other uses

However,in response to public comments from the first comment period, the Board decided that to include stricter requirements for silviculture would not be consistent with the intentions specified in the Notice of Intended Regulatory Action originally filed for this regulatory process. The Board has indicated that they plan to continue to track silvicultural pollution issues and logging BMP implementation trends. If necessary, they may consider further amendments related to silviculture in a future regulatory action. CBLAD staff recommends that no further changes are needed in response to this comment. (sc)

Section Reference: **9VAC 10-20-130**
Subject: Resource Protection Area – Development Criteria
Comments made by: Sierra Club (Falls of the James Chapter)

Comments/Issues: 9 VAC10-20-130, page 10, line 6, "Performance criteria for Resource Protection Areas" changed to "Development criteria". Line 7: "In addition to the general performance criteria set forth in 9 VAC10-20-120, the criteria in this section are applicable in Resource Protection Areas." This indicates the real purpose of the new changes. In addition to the criteria of 9 VAC10-20-120, 9 VAC10-20-130 allows the local government to develop the Resource Protection Areas as never before for redevelopment, new uses established, roads.

CBLAD Response: Page 10, line 6: The change of terminology from "Performance" to "Use and Development" was proposed in the original draft amendments prior to the first public comment period. The words "Use and" were proposed to be deleted in the second draft of the amendments based upon other changes within the text that pertain to the concept of "uses". The changes were made so that the title is more descriptive of the content of the Section. As a section title, it has no legal effect. The change of language on Page 10, line is intended to be a clearer restatement of the original language, and it does not change the intent or application of the Regulations.

The Department does not concur that the intent of these changes in any way permits additional development activities to occur in the RPA. The changes are intended to clarify what activities are permitted in the RPA. The types of development activities that are permitted to occur in the RPA are limited to redevelopment activities, both in Intensely Developed Areas and in isolated redevelopment areas, construction of roads or driveways under certain circumstances, water dependent facilities, and certain types of regional stormwater management facilities or flood control facilities. With the exception of the large SWM and flood control facilities, the allowed development activities within the RPA have not been revised from those currently permitted under the regulations. Furthermore, the proposed revisions clarify the specific circumstances under which redevelopment may occur on isolated redevelopment areas, addressing an issue that has generated many questions and concerns from local governments.

The second revision merely clarifies that, for any allowed development activities in the RPA, both the general performance criteria in 9 VAC 10-20-120 and the provisions outlined in 9 VAC 10-20-130 are applicable. Again, this revision clarifies the original regulatory language, removing any doubt that both sets of performance criteria must be adhered to for any permitted development activity in the RPA. In making it clear that the development activities in the RPA must adhere, not only to the general performance criteria, but also to the more stringent criteria of 9 VAC 10-20-130, the Department believes that the regulations are strengthened.

Therefore, CBLAD staff recommends that there be no further change with regard to these items. (dk/ss)

Section Reference: **10-20-130 1.c**
Subject: Redevelopment for areas outside IDA's
Comments made by: HBAV

Comments/Issues: "Redevelopment" for areas outside IDA's does not allow for any increase in impervious cover or further encroachment into the RPA. *This new provision will either prevent redevelopment in pockets of inner cities or encourage older urban localities to designate their entire area as an IDA. There is no contemplation of more impervious cover in exchange for new stormwater BMP's, utilities, etc. built to today's engineering standards. If water quality protection can be demonstrated with appropriate measures, more redevelopment may occur in urban areas which would help to preserve open space.*

CBLAD Response: Guidance from CBLAD has always emphasized that impervious cover or further encroachment into the RPA is not appropriate for redevelopment. However, by recognizing the need for highly urbanized areas to promote infill development and redevelopment, CBLAD has recommended changes to the development criteria for RPA's section which would allow for more flexibility for impervious cover and encroachment into the RPA within IDA's. The new amendments will allow for the ability to demonstrate water quality protection with appropriate measures in highly urban areas through the IDA concept. (ml)

Section Reference: **9 VAC 10-20-130.1.e**
Subject: RPA Uses (specifically, BMPs in RPAs)
Comments made by: Arlington County, the Chesapeake Bay Foundation, Fairfax County, and the Northern Virginia Regional Council

Comments/Issues: Arlington County points out a potential contradiction between this subsection and 9 VAC 10-20-150.A. This subsection ends by stating " . . . It is not the intent of this subdivision to allow a best management practice that collects and treats runoff from only an individual lot or some portion of the lot to be located within a Resource Protection Area." However, 9 VAC 10-20-150.A states that ". . . Local governments may establish an administrative review procedure to waive or modify the

criteria of this part for structures on legal nonconforming lots or parcels provided that . . . there will be no net increase in nonpoint source pollutant load . . . ."

The CBF continues to strongly oppose the language of this subsection. They view allowing stormwater facilities to be built within RPAs as totally contradictory to the new provisions of the regulations that seek to protect the RPA and its buffer as well as the goals regarding forested buffers in the Chesapeake Bay 2000 Agreement. They state that the incongruous outcome of this provision is that a development may have to protect the 100-foot buffer from encroachment while allowing the more Bayward portions of the RPA to be decimated by the creation of a large stormwater management facility. For example, if a locality includes floodplains in its RPA, and construction of a stormwater management facility in the floodplain does not impact state or federal waters, there is no federal or state permit required and the construction may go forward virtually unchecked, allowing destruction of the Bayward RPA elements while protecting a more landward portion, the buffer. CBF urges the Board to strike subsection 1.e. However, if the Board is not willing to do this, they feel that at a minimum (1) such facilities should be allowed only through the exceptions process and (2) certain additional conditions should be inserted, as follows: *"Flood control and stormwater management facilities that drain or treat water from multiple development projects or from a significant portion of a watershed may be allowed in Resource Protection Areas if it has been conclusively established that the facility cannot be located outside the Resource Protection Area, that the size of the facility is the minimum necessary to provide necessary flood control or stormwater management, and all possible upland best management practices have been implemented to reduce the likelihood of flooding or improve management of stormwater. In addition, such facilities must be consistent with a stormwater management program . . . . It is not the intent of this subdivision to allow a best management practice that collects and treats runoff from only a single development, an individual lot or some portion of a lot to be located within a Resource Protection Area."* CBF further points out that EPA-Region III is on record (9-2-1999 letter to USACOE's Norfolk District Engineer) objecting to the permitting (by the Corps of Engineers of others) of stormwater management facilities in streams, wetlands, or other waters through the use of general permits, and they support restrictions on the use of nationwide permits in 100-year floodplains.

Fairfax County notes that they actively discourage the placement of on-site stormwater management facilities within its Environmental Quality Corridors and does not feel that such facilities ought to be allowed in RPAs without a least some evaluation of alternatives. In the case of what the County views as regional ponds, location along streams is unavoidable and they must, by their very nature, be located within RPAs. The County would support the consideration of such ponds as permitted uses within RPAs. However, the County believes that placement of on-site stormwater management facilities would be best addressed through an administrative exception provision (consistent with the County's current approach) rather than through the designation of such facilities as permitted uses.

Fairfax County requests more clarification of the requirement that stormwater management facilities allowed to be located within RPAs must be ". . . consistent with a stormwater management program that has been approved by the Board as a Phase I modification to the local government's program . . . ." The County feels it is not clear if the term "stormwater management program" is being used (1) in a generic sense to require that those parts of local ordinances that incorporate the SWM criteria of 9 VAC 10-20-120.8 include specific criteria for locating stormwater management facilities in RPAs or (2) if the locations of stormwater management facilities in the RPA must be approved by CBLAB as part of a regional stormwater management plan/program that includes the locations of proposed regional facilities.

The Northern Virginia Regional Council noted that the new revisions to this subsection address most of their concerns regarding the placement of flood control and stormwater management facilities in RPAs. However, they continue to believe that language should be added to clarify that the facilities may be maintained, and that such maintenance may include limited clearing of vegetation within the seaward portion of the RPA. Because a regional SWM facility or a new flood control channel creates a new or expanded perennial water body, it can be assumed that a 100-foot buffer would be required landward of the facility. It would be cumbersome for a locality to have to go through an exception process to simply maintain its flood control and regional SWM facilities.

The NVRC is also concerned about what criteria the Board would use to approve a local SWM program for the purpose of establishing regional SWM facilities within RPAs. If such criteria is not included in the Regulations, the NVRC strongly suggests that the Board undertake a public process with considerable local government input to develop appropriate review policies and criteria.

CBLAD Response: Regarding the Arlington County comment, CBLAD staff take the position that there is not a conflict between the language in this subsection and that in 9 VAC 10-20-150.A. The language in this section establishes that stormwater management facilities that meet the conditions set forth in this subsection may be allowed to be built within the RPA, subject to local approval, without going through the exceptions process or any other extra level of review. The language in subsection 150.A establishes an extra level of review for proposed projects on legal nonconforming lots.

Regarding the CBF comments, this language was originally proposed in recognition of the fact that improved stormwater treatement and construction and maintenance economies can often be achieved through the construction of a single larger facility that receives runoff from an entire drainage area of a subdivision/parcel or from the entire subdivision/parcel, rather than a large number of small, single-lot scale BMPs that typically are never maintained and soon have diminished functionality. However, because of the size requirements for single SWM facilities, they may have to be located lower in the watershed, which may mean encroaching into the RPA, as is pointed out by Fairfax County.

The Board has attempted through two versions of this language to refine the conditions that apply to allowing such facility siting in order to optimize between protecting the buffer and other RPA features and allowing for cost-effective stormwater management. However, the clear intention was to provide the proper conditions so that such facilities could be permitted locally *without* having to go through the exceptions process. Since obtaining the needed state and federal permits for such structures is included among the conditions, if EPA has communicated to the Corps of Engineers its objections to some of these kinds of structures or locations for them, then presumably the federal/state permit process would limit their number to those that are absolutely essential.

It might be useful for the Board to add some of the conditions recommended by the CBF to those already included in this section, which would also be consistent with Fairfax County's suggestion of some type of alternatives review. However, CBLAD staff does not agree with all of the additional recommended conditions. Requiring "all possible upland best management practices" to be implemented implies the numerous single-site BMPs that are considered already to cause problems. Furthermore, CBLAD staff believes the proposed language ". . . established that the facility cannot be feasibly located outside . . ." is too subjective and, therefore, too limiting. Such language would invite endless arguments regarding whether a facility is capable of being located elsewhere, when the issue is whether the location is *optimum* in light of all that the regulations are intended to accomplish. It *is* the Board's intention to allow SWM facilities that treat runoff from "single developments" as well as multiple developments, but *not* from individual lots or portions of lots (which should satisfy Fairfax County's concern about single-lot BMPS). It is worth pointing out that the first two conditions CBF recommends are consistent with the avoid/minimize/mitigate priorities of the federal wetlands and other permitting programs.

Fairfax County's preference for an administrative exceptions process for single-site BMPs is duly noted and will be called to the Board's attention. This could be addressed more appropriately in 9 VAC 10-20-150.C, which establishes criteria for local exceptions processes.

Fairfax County also requested more clarification regarding the language in this subsection pertaining to Board approval of local stormwater management programs. The intent here is that in order for a locality to have the authority to allow development-scale or larger SWM facilities to be located within RPAs without going through an exceptions process, the locality must have submitted and received Board approval of a stormwater management program that includes a conceptual plan and parameters for "regional" basins and, perhaps, their generalized sizes and locations. To answer the NVRC's question, the basic criteria the Board uses in considering such plans is whether they will achieve water quality protection equivalent to that which would be accomplished by implementing the basic stormwater requirements (no-net increase for new development and a pollution reduction for redevelopment) over the land area addressed by the submitted plan. The Board has been careful about not making its review criteria too specific, in order to allow enough flexibility for customizing location plans to local conditions. Typically, the Board is not as interested in specific basin locations, because

they understand that such things must often be adjusted to timing and circumstances. A number of localities have received Board approval for such plans, and there is a good deal of variability among their approaches and requirements, but they were all recognized as achieving "equivalent" results.

The NVRC makes a good point that these SWM facilities must be maintained routinely and, since they would be located within RPAs, it may be important to specify that maintenance is allowed in order to not by oversight force maintenance activities to be reviewed in each instance through the exceptions process. (sc)

Text as initially recommended for change:

e. [~~*Subdivision-scale and regional-scale flood*~~ *Flood*] *control and stormwater management facilities* [*that drain or treat water from multiple development projects or from a significant portion of a watershed*] *may be* [~~*constructed*~~ *allowed*] *in Resource Protection Areas* [*provided that such facilities are consistent with a stormwater management program that has been approved by the Board as a Phase I modification to the local government's program. Furthermore, ~~if~~*] *all applicable permits for construction in state or federal waters* [~~*have been*~~ *must be*] *obtained from the appropriate state and federal agencies, such as the U.S. Army Corps of Engineers, the Virginia Department of Environmental Quality, and the Virginia Marine Resources Commission*[*, and approval must be received from the local government prior to construction. It is not the intent of this subdivision to allow a best management practice that collects and treats runoff from only an individual lot or some portion of the lot to be located within a Resource Protection Area*].

Text as now recommended for change:

e. [~~*Subdivision-scale and regional-scale flood*~~ *Flood*] *control and stormwater management facilities* [*that drain or treat water from multiple development projects or from a significant portion of a watershed*] *may be* [~~*constructed*~~ *allowed*] *in Resource Protection Areas* [*provided that* ***(1) the local government has conclusively established that location of the facility within the Resource Protection Area is the optimum location; (2) the size of the facility is the minimum necessary to provide necessary flood control, stormwater treatment, or both; (3)*** ~~***such facilities are***~~ ***the facility must be*** *consistent with a stormwater management program that has been approved by the Board as a Phase I modification to the local government's program****.*** ~~***Furthermore,***~~ ~~*if*~~***; (4) that*** *all applicable permits for construction in state or federal waters* [~~*have been*~~ *must be*] *obtained from the appropriate state and federal agencies, such as the U.S. Army Corps of Engineers, the Virginia Department of Environmental Quality, and the Virginia Marine Resources Commission****[~~,~~;*** *and* ***(5)*** *approval must be received from the local government prior to construction.* ***In addition, routine maintenance may be performed on such facilities to assure that they continue to function as designed.*** *It is not the intent of this subdivision to allow a best management practice that collects and treats runoff from only an individual lot or some portion of the lot to be located within a Resource Protection Area*].

Text as finally recommended for change (minor changes resulting from Board discussion at the work):

e. [~~*Subdivision-scale and regional-scale flood*~~ *Flood*] *control and stormwater management facilities* [*that drain or treat water from multiple development projects or from a significant portion of a watershed*] *may be* [~~*constructed*~~ *allowed*] *in Resource Protection Areas* [*provided that* ***(1) the local government has conclusively established that location of the facility within the Resource Protection Area is the optimum location; (2) the size of the facility is the minimum necessary to provide necessary flood control, stormwater treatment, or both; (3)*** ~~***such facilities are***~~ ***the facility must be*** *consistent with a stormwater management program that has been approved by the Board as a Phase I modification to the local government's program*~~***. Furthermore,*** *if*~~] ***; (4)*** *all applicable permits for construction in state or federal waters* [~~*have been*~~ *must be*] *obtained from the appropriate state and federal agencies, such as the U.S. Army Corps of Engineers, the Virginia Department of Environmental Quality, and the Virginia Marine Resources Commission* **[**~~**,**~~**;** ~~*and*~~ ***(5)*** *approval must be received from the local government prior to construction*~~.~~ ***; and (6 routine maintenance is allowed to be performed on such facilities to assure that they continue to function as designed.*** *It is not the intent of this subdivision to allow a best management practice that collects and treats runoff from only an individual lot or some portion of the lot to be located within a Resource Protection Area*].

The Board voted unanimously to adopt these changes.

Section Reference: **9VAC 10-20-130.2**
Subject: Exemptions in the RPA
Comments made by: Fairfax County and the Home Builders Association of Virginia (HBAV)

Comments/Issues: The HBAV states that subsection 2 establishes new criteria for exemptions in the RPA and they want the Board to change the language from "may be exempt" to "shall be exempt" as long as the stipulations are met. Fairfax County notes that there were no substantive revisions to this subsection, but commented it would be helpful if the language were clarified to state more clearly that local governments may exempt these activities but are not required to do so.

CBLAD Response: The text of subsection 130.2 was formerly 10-120-150.C and the only proposed changes are technical with regard to construct of the wording. Accordingly, the HBAV comment is incorrect in that new criteria are not created. Since 10-20-130.2 reflects existing wording and there has not been previous comment or problem with its permissive context, a change does not appeared warranted or appropriate at this time. With regard to the Fairfax County comment, the Department should issue a general policy statement with respect to the use of "may" and "shall" and, in this context, clarify that the discretion for this and similar uses rests with the localities.

Accordingly, CBLAD staff recommends that there be no changes to this section in response to the comments. (dk)

However, in reading through this one last time prior to mailing it to the Board, staff determined that the grammatical construction of this section is awkward and can be clarified by making the following recommended revision, which the Board needs to review prior to consideration of adoption final regulation amendments at their December 10, 2001 quarterly meeting:

Text as finally recommended for change:

2. Exemptions in Resource Protection Areas. The following land disturbances in Resource Protection Areas ***may be exempt from the criteria of this part provided that they comply with subdivisions a and b below of this subsection***: (i) water wells; (ii) passive recreation facilities such as boardwalks, trails and pathways; and (iii) historic preservation and archaeological activities ***[~~may be exempt from the criteria of this part (IV (9 VAC 10-20-110 et seq.) of this chapter, provided that they comply with the following requirements:~~ .]***

Section Reference: **9 VAC 10-20-130.3**
Subject: Resource Protection Area - Buffer Area
Comments made by: The Home Builders Association of Virginia

Comments/Issues*:* Subsection 130.3 specifies that the 100 RPA buffer may never be reduced in width. While encroachments into the buffer zone will be allowed, the HBAV feel this substantially changes the terms under which the existing CBPA program has been administered, eliminates the water quality equivalency concept, will significantly impact new development where a 100-foot wide buffer zone must be preserved and is inconsistent with the relief afforded the agricultural industry. The regulations appear to demand setbacks regardless of function. For example, wetlands are excellent buffers in themselves, absorbing many pollutants. Also the regulations provide no consideration of length of travel (such as a levee that directs runoff away form adjacent waters or BMPs.) The regulations should continue to permit water quality equivalency to stimulate the development of such measures. To this end, HBAV recommends three changes:

(1) Delete the second sentence beginning with *"Notwithstanding permitted use . . ."*
(2) Restore the stricken sentence beginning with *"Except as noted...."*
(3) Add language to the restored sentence so that it reads: *"Except as noted in this subsection a combination of a buffer area not less than 50 feet in width and appropriate best management practices located landward of the buffer area which collectively achieve water quality protection, pollutant removal, and water resource conservation at least the equivalent of the 100-foot buffer area**, as shall be demonstrated by a water quality impact assessment,** may be employed in lieu of the 100-foot buffer."*

CBLAD Response: As noted in the staff recommendations resulting from the first set of public comments (fall 2000)**,** while the proposed regulatory amendments remove the

specifically identified buffer equivalency language from the Regulations, developers and others retain the option of requesting development-wide buffer encroachments through the local exception review process. A major thrust of the proposed changes was to address the notion that the 100-foot buffer component of the RPA can be reduced. To address concerns raised during the initial comment period, additional grandfathering language was inserted into the proposed regulations to address those approved subdivisions and other projects where the locality has approved a 50-foot RPA buffer component (see Section 9 VAC 10-20-130.4.b of the proposed regulations). This provision should address those development proposals that have been previously approved by a local government. The Department has also recommended some revisions to the Intensely Developed Area designation criteria to clarify the intent of the regulations as they pertain to areas with concentrated development patterns where the water quality function of the buffer may be diminished. However, the Department and the Board believe that any new subdivision or development outside of IDAs, must comply with the full intent of the regulations as they pertain to the RPA designation, including the 100-foot buffer component. Developers retain the right to apply for variances or exceptions from a locality. As part of any approval for such variances or exceptions for development-wide encroachments, buffer equivalency can be considered through the evaluation of a Water Quality Impact Assessment. The proposed regulations already make it clear that a Water Quality Impact Assessment is required for consideration of any permitted encroachment into or modification of any and all components of the RPA, and for any variance or exception request relating to other development activities in the RPA.

Based on the initial proposed revisions and the additional revisions relating to this isue, it is CBLAD staff's recommendation that there be no further changes with regard to these comments. (ss)

Section Reference: **9VAC 10-20-130.3.**
Subject: Buffer area requirements
Comments made by: Arlington County

Comments/Issues: This subsection states that ". . . Notwithstanding permitted uses, encroachments, and vegetation clearing, as set forth in this section, the 100-foot wide buffer area is never reduced in width. To minimize the adverse effects of human activities on the other components of the Resource Protection Area, state waters, and aquatic life, a 100-foot wide buffer area of vegetation shall be retained if present and established where it does not." Arlington County asks if this means that a local government must require establishment of a buffer, including planting vegetation, unless it is an exempted use, an encroachment, or vegetation clearing for lines of site, etc.? They note that requiring such revegetation and enforcing such a program in an urban area like Arlington County will be extremely burdensome, particularly when many of the lots are small and provide the only backyard space available to these property owners.

CBLAD Response: The actual phrase relating to establishing or retaining the buffer changed very little and the intent of this section has not changed from the original

regulations. The only change to the sentence that begins with "To minimize the adverse effects of human activities on other components of the Resource Protection Area…" was the addition of the word "wide" to read ". . . a 100-foot wide buffer area of vegetation that is effective in retarding runoff, preventing erosion, and filtering nonpoint source pollution shall be retained if present and established where it does not exist." The Department has not required the establishment of vegetation in RPA buffer area on properties with existing development where no other building activity has occurred. The Department has encouraged localities to investigate opportunities to enhance RPA buffer vegetation for projects on lots or parcels with RPAs when additional impacts to the RPA occur or where open areas are unvegetated and eroding. The Department has also noted that in cases where vegetation has been illegally cleared from RPA buffers, localities should require that the owner replace the vegetation as mitigation. Finally, the Department has begun a project to help provide guidance to help clarify to localities and others how to best restore vegetation in illegally cleared RPA buffer areas.

The Department has not recommended any significant changes to this section, and has not interpreted the existing language in the manner outlined in the comment above. Therefore, CBLAD staff recommends that there be no further changes in response to this comment. (ss)

Section Reference: **9 VAC 10-20-130.3.b**
Subject: Resource Protection Area - Buffer Area Restoration
Comments made by: The Home Builders Association of Virginia and Thomas Tomlin

Comments/Issues: Mr. Tomlin states that "9 VAC 10-20-130(3)(b) would require that upon the cessation of a farming or timbering use and it then used as residential, then a 100 foot buffer would have to be restablished. This is blatantly unfair. It is again discrimination against the residential homeowner. A farmer or logger can disturb the land to within 25 feet of the RPA but it a homeowners buy a open lot that was farmed, in particular, the homeowner in addition to using E&S controls, which farming and timbering do not, must then rebuffer the 100 foot when it was not buffered by the farmer or logger in the first place."

The HBAV agrees and further states that subsection 3.b requires reestablishing a full 100-foot wide buffer with "woody vegetation." This constitutes an unreasonable mandate on property owners and does not recognize other methods or plant materials to achieve the buffer functions. The HBAV asks if better water quality is the goal, then why should a property owner be made to obscure a view, possibly devaluing it, with trees when other measures could realize the goal?

CBLAD Response: This subsection specifically address those circumstances where the use of a property changes from agriculture or silviculture to some other use, such as a residential subdivision, etc. One intention of this provision was to close a loophole that permits the wholesale clearing of the 100-foot buffer under one of the agriculture or forestry provisions, in preparation for land development, and not in the course of a true agricultural or forestry use. Many commenters perceived an inequality in the way the

buffer requirements are applied to agricultural and forestry uses versus other land uses. The Department believes that this new provision begins to address some of the perceived and real inequalities. Another intention of this provision is to address the revegetation of disturbed or cleared RPA buffer areas with grass or lawn. Lawns are not nearly as effective as woody vegetation in providing all the water quality functions of a buffer (e.g., nutrient uptake through deep root systems, water shading/cooling, and erosion control). This provision would not apply to the 100-foot buffer areas for other land use areas. The regulations, for these other areas, merely retained the requirement that ". . . a 100-foot wide buffer area of vegetation that is effective in retarding runoff . . . ."

Finally, woody vegetation can mean more than just trees. The landowner may select vegetation that provides a filtered view but which still protects water quality with a variety of woody shrubs. The Department has begun to develop scientifically-based guidance to help clarify to localities and others how to best restore vegetation in illegally cleared RPA buffer areas, and how to permit vegetation clearing for site lines, views and vistas, and other modifying provisions in the regulations. Therefore, CBLAD staff recommends no further changes in response to this comment. (ss)

Section Reference: **9 VAC 10-20-130.4.a**
Subject: Resource Protection Area - Buffer Area
Comments made by: The Home Builders Association of Virginia and Kenneth Johnson

Comments/Issues: The HBAV perceives subsection 4.a to set forth new requirements for permitted encroachments into the buffer zone and restrict any encroachment into the seaward 50-foot buffer zone. They feel that this requirement is inconsistent with the relief afforded the agricultural industry.

Mr. Johnson recommends that language be added to the Regulations that exempts lots recorded prior to October 1, 1989, that have a locally approved site plan, from the 100–foot RPA buffer requirement. In addition, the Mr. Johnson recommends that the regulations allow localities to renew previously approved site plans for Pre-89 lots that allow encroachments into the landward 50-feet of the RPA buffer.

CBLAD Response: Regarding the HBAV comment, there were no significant changes to subsection 4.a from the draft of the regulations made available for comment earlier this summer. The language clearly allows an administrative process to be used by localities to approve encroachments into the landward 50 feet of the 100-foot RPA buffer area for lots that may have been recorded prior to October 1, 1989 and for which there is insufficient buildable area for a principle structure and necessary utilities. The provision that restricts the application of this administrative waiver process to the landward 50 feet of the 100-foot RPA buffer area remains essentially unchanged from the existing regulations, with the exception of how the provision is stated. It has always been the intention of this subsection to provide by-right relief only to the landward 50 feet. The proposed revisions to this subsection do not change that intention and are consistent with guidance provided to localities by the Department for a number of years. As with the existing regulations, any person who wishes to encroach into the seaward-50 feet of the

100-foot RPA buffer area, may apply for a formal variance or exception from the local government.

Previous revisions to subsection 4.a(2) changed the word "possible" to "practicable" and added the word "vegetated" to convey the idea that mitigation for these types of permitted encroachments should consider enhancement of vegetation elsewhere on the site. The additional vegetated area would offset the loss of some of the water quality function that would have been performed by an undisturbed 100-foot buffer area. This provision is not mandatory under every circumstance, as noted by the choice of the word practicable. Neither does this provision dictate the types of vegetation that should be added to the additional buffer area. The Department envisions that such details will be decided on a case-by-case basis by local governments. As noted earlier, the changes to this section do not change the intent of the original language and do conform to guidance that has been provided to localities for a number of years.

Regarding Mr. Johnson's comments, the provisions in the draft Regulations for development on pre-89 lots have not substantively changed. Encroachments into the landward 50-feet of the RPA buffer are allowed <u>if</u> there is not an adequate buildable area outside of the RPA. Site plans allowing encroachments on pre-89 lots that have adequate buildable area outside the RPA should not have been approved by localities. If such plans were erroneously approved, the local government's decision as to whether they should be renewed should be based on whether the property owner's rights have become vested.

Therefore, CBLAD staff recommend that no further changes be made in response to these comments. (ss/sm)

Section Reference: **9VAC 10-20-130.4.b**
Subject: Grandfather date for the period of October 1989 to now
Comments made by: The Chesapeake Bay Foundation; Peter and Sandra Hirschoff

Comments/Issues: The CBF is strongly opposed to the inclusion of this provision. They view additional grandfathering as contradictory to the revised provisions that seek to protect the buffer. They also are concerned with the lack of a definition or parameters for the term "buildable area". They recommend inserting the word "sufficient" prior to the term "buildable area". They also recommend an additional criteria, that "the buildable area after application of the 100-foot buffer is less than 10,000 square feet". The Hirschoff family questioned why the date of the revision isn't contained in the subsection.

CBLAD Response: Regarding the Hirschoff's question, the language being used is the proper Code Commission convention for the drafting of regulations, for which the effective date is not yet known.

The reason and rationale for the addition of 9VAC 10-20-130.4.b is contained in the first response document. This specific item was the focus of extensive, specific discussion

before the Board, and the they considered the proposed language to be reasonable and appropriate.

The concern with use of the term "buildable" was discussed during the first comment period. Instead of trying to put a more specific definition or parameters on this term, staff recommends that it be left as is. Likewise, staff does not support inserting the suggested additional criteria, since it may well have an effect of inadvertently establishing a standard by which "buildable area" is determined. That is, any residual portion of a lot, outside the buffer, that is less than 10,000 might be considered as "not buildable," when in fact it may be feasible to build there.

CBLAD staff recommends that there be no further changes to this section. (dk)

Section Reference: **9VAC 10-20-130.5.a**
Subject: Permitted modifications of the buffer area
Comments made by: The Chesapeake Bay Foundation and Fairfax County

Comments/Issues: Fairfax County comments that the July 30, 2001 draft of the revised Regulations has added language to require prior approval from the local government for permitted modifications of the buffer area. This is a significant step forward in addressing abuses of these provisions. However, they believe the vagueness in the regulations has not been addressed, and the permitted modifications to the buffer area are problematic to enforce because of their vagueness.

Subparagraph a(1) allows trees to be pruned or removed to provide sight lines and vistas and to be replaced with other vegetation. Clarification of what constitutes a reasonable sight line or vista along with specific evaluation criteria should be incorporated into the Regulations.

Subparagraph a(3) has been amended in the July 30, 2001 draft to require the removal of dead, diseased, or dying trees or shrubbery and noxious weeds (such as Johnson grass, kudzu, and multiflora rose) and silvicultural thinning be conducted "pursuant to sound horticultural practice incorporated into locally-adopted standards." This returns some of the control to local governments that is absent in the existing Regulations. An explicit requirement for replacement of the vegetation removed should be included in the Regulations, as is required with the provisions for creating sight lines and vistas in subparagraph a(1).

On the other hand, the CBF believes subsection 130.5 should no longer contain a provision allowing for clearing for "reasonable sight lines" and pruning for "sight lines and vistas." There has been repeated abuse of this provision. At a minimum, they believe the regulations should specify no more than 5% clearing.

CBLAD Response: There have been no changes to the regulations regarding this provision; the language has merely been relocated. The Department is currently working on a project to provide better guidance to local governments regarding this provision and

believes that better guidance is the preferable way to address this issue. This project will include local government as well as expert input and should result in standards that will be scientifically defensible and relieve some of the administrative burden on local governments. The issue of clearing vegetation for sight lines, views and vistas is one that will likely require a range of options, depending on a number of site-specific factors. The Department did not believe that it would be possible to craft regulatory language that would adequately address all possible scenarios, while remaining clear and concise. The Department will also be reviewing local policies relating to these provisions as part of its Phase I Implementation Review process, currently under development. Therefore, CBLAD staff believes it is more effective to address these issues through this guidance than through more regulatory language, and that no further changes be made in response to this comment. (ss)

Section Reference: **9 VAC10-20-130.5.b**
Subject: Agricultural Buffer Flexibility
Comments By: Thomas Thomlin (Northumberland County Board of Supervisors) and the Homebuilders Association of Virginia

Comments/Issues: Agriculture appears to be exempt from the regulations or receive preferential treatment, specifically, the ability to farm or practice silviculture within the 100' buffer.

CBLAD Response: This is a reiteration of a comment from the first comment period. The Board discussed this issue and chose not to make any changes to the proposed regulation. The agricultural industry successfully argued during the original regulation development process that the requirement to have a conservation plan developed would give the local, state and federal conservation agencies access to many farmers with whom they had not previously been able to work and that they would then be able to exercise their persuasive influence to convince the farmers to implement some or all aspects of these plans without having implementation required in the regulations. The requirement for implementation of individual BMPs or the complete conservation plan were reserved for those tracts where 50-foot and 75-foot modifications of the buffer, respectively, were allowed for production purposes. Calculations were performed by the USDA-Natural Resource Conservation Service at that time demonstrating that implementing even a single nutrient management or erosion control practice (BMP) on an entire field achieved greater pollution removal than the 100-foot buffer by itself. These agricultural practices are revisited, maintained, and or updated annually as part of the farm's production plan, unlike many urban BMPs. Furthermore, there is substantial anecdotal evidence that many farmers are, indeed, implementing substantial elements of their plans voluntarily, even without such a requirement.

Agricultural uses do have to comply with a full soil and water conservation plan if the agricultural activity is to be permitted to occur to within 25 feet of the other RPA feature. In order to be able to farm within the landward 50 feet of the buffer area, there must be one or more agricultural water quality best management practices in place on the adjacent farm field. The proposed amendments improve upon these conditions. Silvicultural

activities are only exempted when they comply with the Department of Forestry's set of BMPs. Both silvicultural and agricultural activities are ongoing, renewable economic activities with strong supportive lobby groups. The primary difference in these activities and home construction is that home construction is permanent, while silviculture, if correctly undertaken, is a renewable resource and the disturbance to the land and existing vegetative cover should be limited in time. Likewise, agricultural activities do not result in permanent impervious coverage. The Department recognizes the fact that agricultural and silvicultural activities are not subject to the same level of scrutiny as new construction and development. However, these issues have repercussions far beyond the scope of the Bay Act.

The Board views that these are valid reasons for the different kinds of flexibility afforded the various land uses and has articulated these reasons and discussed them with stakeholders during the several evaluations of the regulations and at various other times over the program's history. CBLAD staff recommends that no further changes be made in response to these comments. (rw/sc)

Section Reference: **9 VAC 10-20-130.5.b**
Subject: Resource Protection Area - Buffer Area
Comments made by: The Home Builders Association of Virginia

Comments/Issues: Subsection 130.5 restates criteria for modifications to the buffer zone for development and agriculture. While the development standards have not changed appreciably, the the HBAV comments that the "lax" standards for agriculture are at least given some strengthening through the new enforcement mechanism. Research has demonstrated the significant role soil disturbance in agriculture has played in NPS pollution, and the agricultural industry should have the same level of accountability that is required of the development industry. The HBAV states that these provisions should be reexamined, and BMPs should be included in the list of permitted modifications.

CBLAD Response: This section has not been significantly revised from the first draft available for public comment. Minor changes have been made to provide greater clarity. The Board did not consider more changes necessary. Therefore, CBLAD staff recommend that nor further changes be made in response to this comment. (ss)

Section Reference: ***9 VAC 10-20-130.5.b(1)(a), b) and (c)***
Subject: Modifications of agricultural buffers; reference documents and enforcement
Comments made by: The Northern Virginia Soil and Water Conservation District

Comments/Issues: The NVSWCD states that the regulations are in conflict with Virginia's Agricultural Stewardship Act, and they do not want to be "whistleblowers."

CBLAD Response: The Chesapeake Bay Preservation Area Designation and Management Regulations are separate and distinct from the Virginia Agricultural Stewardship Act. One key difference is the latter is enforced by a state agency –

VDACS, whereas the CBPA regulations require local implementation and enforcement. In either case, the local SWCD is viewed as a crucial element in assisting the county or the state in obtaining and verifying landowner compliance. Ultimately, the county and the VDACS have the enforcement authority for their respective ordinances and regulations.

Regarding the SWCDs role as "whistleblower," CBLAD has added language to the regulations the states:

> *(5) In cases where the landowner or his agent or operator has refused assistance from the local soil and water conservation district in complying with or documenting compliance with the agricultural requirements of this chapter, the District shall report the noncompliance to the local government. The local government shall require the landowner to correct the problems within a specified period of time not to exceed 18 months from their initial notification of the deficiencies to the landowner. The local government, in cooperation with the District, shall recommend a compliance schedule to the landowner. This schedule shall expedite environmental protection while taking into account the seasons and other temporal considerations so that the probability for successfully implementing the corrective measures is greatest.*]

Therefore, it should be clear that the SWCD would only refer to local government those landowners who have refused assistance and refused to cooperate. When performing their initial field visit, the SWCD should inform the landowner and operator of the consequences that they may face should they choose not to cooperate. In those rare cases where the landowner refuses to cooperate, the SWCD should feel no remorse in informing the local government of the situation. The CBPA Designation and Management Regulations are just that – regulations, and the local government and its agents must exercise diligence in carrying out the charge of the regulations. they may certainly do so. As the regulations only require that the findings and recommendations of assessments and any resulting soil and water quality conservation plans be submitted to the local SWCD Board of Directors, which will be the plan-approving authority, the local SWCD is free to "opt-out" of CBLAD's Agricultural Water Quality Grant Program, which provides supplemental funding to SWCDs who assist their local governments with the agricultural criteria. Therefore, CBLAD staff recommend that no further changes ba made in response to this comment. (rw)

Section Reference: **Section 9 VAC10-20-130(5)(b)(4) and (5)**
Subject: Enforcement
Comments By: Thomas Tomlin (Northumberland County Board of Supervisors)

Comments/Issues: Mr. Tomlin calls into question the time frame allowed to correct any violations or other conservation problems that may be found, feeling that it may take too long. He states that it appears the new language would allow non-compliant farming practices a much longer time to be corrected (and thus, to continue to pollute) than would be tolerated for construction practices under the E&S Control Law. In that regard, Mr. Tomlin believes that, consistent with the aims of the Agricultural Stewardship Act,

any short-term or temporary measures should be implemented to protect water quality until such time as a permanent corrective action can be taken.

CBLAD Response: CBLAD staff recommends a slight change in language to address the expressed concern and to clarify the intent. Also, this was another section that continued to refer to "tributary streams." (rw/sc)

Text as initially recommended for change:

[*(4) If specific problems are identified pertaining to agricultural activities which, in the opinion of the local soil and water conservation district board, are causing pollution of the nearby tributary stream or violate performance standards pertaining to the vegetated buffer area, such problems must be corrected within a specified period of time that takes into account the seasons and other temporal considerations so that the probability for successfully implementing the corrective measures is greatest.*

Text as now recommended for change:

[*(4) If specific problems are identified pertaining to agricultural activities which, in the opinion of the local soil and water conservation district board, are causing pollution of the nearby tributary stream or violate performance standards pertaining to the vegetated buffer area,* ***~~such problems must be corrected within a specified period of time that takes~~ the local government, in cooperation with soil and water conservation district, shall recommend a compliance schedule to the landowner. This schedule shall expedite environmental protection while taking*** *into account the seasons and other temporal considerations so that the probability for successfully implementing the corrective measures is greatest.*

Board members discussed this proposal at the work session and several had additional concerns. First they agreed they didn't want to have language in the regulations that defers to anyone's "opinion" of whether or not pollution is occurring. Second, they want the regulation language to require that the pollution problems are indeed corrected in a timely manner, consistent with the compliance schedule provided to the landowner or operator.

Text as finally recommended for change *(minor changes resulting from Board discussion at a work session on October 31, 2001)**:***

[*(4) If specific problems are identified pertaining to agricultural activities which~~, in the opinion of the local soil and water conservation district board,~~ are causing pollution of the nearby ~~tributary stream~~* ***water body with perennial flow*** *or violate performance standards pertaining to the vegetated buffer area,* ***~~such problems must be corrected within a specified period of time that takes~~ the local government, in cooperation with soil and water conservation district, shall recommend a compliance schedule to the landowner and require the problems to be corrected consistent with that schedule. This schedule shall expedite environmental protection while taking*** *into account the seasons*

and other temporal considerations so that the probability for successfully implementing the corrective measures is greatest.

The Board voted unanimously to adopt these changes.

Section Reference: **9VAC 10-20-130.6**
Subject: Water Quality Impact Assessments (WQIA)
Comments made by: Chesapeake Bay Foundation
Hampton Roads Planning District Commission
York County

Comments/Issues: CBF desires that public notice and pubic review should be required (similarly that such review and notice should be required for any activity in a RPA) and that the minimum standards for a WQIA should be contained in this subsection. York County and HRPDC commented that the allowable CBLAD review period should be 45 days to coincide with limitations placed upon local governments in their review of development proposals.

CBLAD Response: With regard to the comment from York County, HRPDC, and others regarding the time for the voluntary WQIA reviews, staff recommends that all reference to any time frame be stricken from the Regulations. The reference in 10-20-130.6 is to a section of the Act, itself, and it is not necessary to reiterate the time frame. Also, since the 90-day period is stated in the Act, a different time frame should not be stated in the Regulations. The Department actually provides comments in a much shorter time frame, recently ranging from one day to a few weeks.

Department staff feel that the CBF's desire that there be a public notice and public review for any activity in the RPA is excessive and unnecessary. Some items are specifically exempt (see 10-20-130.2) under certain conditions; thus, requiring a notice and public review would be contrary to such exemption provisions. Also, under the newly proposed exception requirements a public hearing would be required for new development that encroaches into the RPA – development that requires the preparation of a WQIA.

There has been discussion about whether to include the requirements of a WQIA in the Regulations with the conclusion being that it is not appropriate to do so at this time. Guidance has been provided as to the content of a minor and major WQIA through the model ordinance; however, defining the contents of a WQIA and making them mandatory through inclusion in the Regulations will require an extensive process involving local units of government and additional public comment. Thus, proceeding with such a change at this time does not appear appropriate. (dk)

Text as initially recommended for change:

9 VAC 10-20-130.6.a ". . . . . Upon request the board will provide review and comment regarding any water quality impact assessment within 90 days, in accordance with advisory state review requirements of § 10.1-2112 of the Act."

Text as now recommended for change:

9 VAC 10-20-130.6.a ". . . . . Upon request the board will provide review and comment regarding any water quality impact assessment **~~within 90 days,~~** in accordance with advisory state review requirements of § 10.1-2112 of the Act."

The Board voted unanimously to adopt this change.

Section Reference: **9 VAC 10-20-130.7**
Subject: RPA Buffer in IDA's
Comments made by: Arlington County and Fairfax County

Comments/Issues: The language has not been changed in the July 30, 2001 draft of the revised Regulations. The revised Regulations would state: "In Intensely Developed Areas and isolated redevelopment and in-fill sites which meet the criteria . . . for designating Intensely Developed Areas, establishment of vegetation in the 100-foot wide buffer area *may not* be required." Previously, the Regulations allowed for the exemption of redevelopment from buffer area requirements but did not provide a similar exemption for infill development. Given the intent to have buffer areas established over time, and given that the proposed revisions to the Regulations would not establish infill development as an allowed use within RPAs (see paragraph 1 of Section 9 VAC 10-20-130), Fairfax County states that the introduction of allowable encroachments into RPA buffer areas for infill development would seem to run counter to the intent of the Regulations and may create an internal inconsistency within the Regulations.

Arlington County considers the meaning of the words "may not" to be ambiguous, since it could be interpreted as prohibiting the local government from requiring such revegetation, or alternatively it could mean that CBLAD does not require the local government to seek such revegetation measures on each site. Particularly with the reference to isolated redevelopment and in-fill sites, this ambiguity could have unintended consequences and should be clarified.

CBLAD Response: The intent of this phrase was for the buffer reestablishment to be permissive rather than required, since such re-establishment may not be feasible or desirable in all cases. CBLAD staff also agrees with the Fairfax County comment, and recommends the following change to the language: (ml)

Text as initially recommended for change:

7. Buffer area requirements for Intensely Developed Areas. In Intensely Developed Areas and isolated redevelopment and in-fill sites which meet the criteria set forth in 9 VAC 10-20-100 for designating Intensely Developed Areas, establishment of vegetation in the 100-foot wide buffer area may not be required. However, while the immediate establishment of vegetation in the buffer area may be impractical, local governments shall give consideration to implementing measures that would establish vegetation in the

buffer in these areas over time in order to maximize water quality protection, pollutant removal, and water resource conservation.

Text as now recommended for change:

7. Buffer area requirements for Intensely Developed Areas. In Intensely Developed Areas ***~~and isolated redevelopment and in fill sites which meet the criteria set forth in 9 VAC 10-20-100 for designating Intensely Developed Areas~~, ~~establishment of vegetation in the 100-foot wide buffer area may not be required~~ <u>the local government may exercise discretion regarding whether to require establishment of vegetation in the 100-foot wide buffer area</u>***. *However, while the immediate establishment of vegetation in the buffer area may be impractical, local governments shall give consideration to implementing measures that would establish vegetation in the buffer in these areas over time in order to maximize water quality protection, pollutant removal, and water resource conservation.*

The Board voted unanimously to adopt this change.

Section Reference: 9VAC 10-20-150.A
Subject: Nonconformities - Uses
Comments made by: Northern Virginia Regional Commission

Comments/Issues: The NVRC comments that "Although the title of this section includes non-conforming 'uses' as well as 'structures', the supporting language makes reference only to structures. Because there are many non-conforming 'uses' that can be in an RPA that do not involve structures (such as baseball diamonds and other intense recreational uses), NVRC staff suggests adding the term 'use' in the supporting language of this section."

CBLAD Response: The NVRC question and the associated issues are well taken. However, this subject was not broached during the first review when substantive changes were proposed in response to public comment, and CBLAD staff does not believe the remedy is as simple as inserting the word "use" within the section. As written, the section deals with the location of a structure and not the related land use itself, since the land use is regulated by local zoning provisions. As a matter of policy, CBLAD has interpreted these provisions as allowing the continuation and maintenance of uses such as ball fields or golf courses, but not their further encroachment into the buffer. The Board should address the concerns raised by NVRC in the guidance that is to be issued following adoption of the revised Regulations.

Accordingly, CBLAD staff recommends that there be no further changes to this section at this time. (dk)

Section Reference: **9 VAC 10-20-150.B.1 and 2**
Subject: Exemptions for utilities
Comments made by: Fairfax County, the Hampton Roads Planning District Commission, the Home Builders Association of Virginia

Comments/Issues: Fairfax County notes that these requirements have not been substantively changed in the latest proposed revision of the regulations. However, the adjective "natural" has been added to gas lines resulting in the exclusion of petroleum pipe lines from this exemption. The proposed revisions stipulate that the exemption for water, sewer, gas, fiber optic, and cable television lines would apply only to "local" lines. It is not clear what is meant by "local." The "Explanation" document states that this change has been proposed to "clarify that all the listed exempt utilities are local utilities." If it is the intent to add the word "local" in order to distinguish between gas and fiber optic lines covered by subparagraph 1 from those lines covered by subparagraph 2, and if the change will not preclude the construction of utility lines within RPAs, then the County would not object to the proposed language. If, however, the insertion of the word "local" would hinder, for example, the County from constructing sewer lines within the RPA (subject to the four conditions listed under paragraph 2), the County would object to the narrowing of this exemption.

The HBAV requests that subsection B.1 specifically exempt all linear projects, whether public or private, as long as they have received E&S plan approval.

CBLAD Response: In response to Fairfax County's question, the Board does not intend the language in this subsection to hinder local government construction of sewer lines within the RPA as long as the listed conditions are met. The HRPDC, however, expressed a valid concern that the word "local" may be too limiting, since in their area a regional service authority builds, owns and maintains the public sewage collection and treatment system. This can be addressed by a minor change in the language.

The main intent of this subsection section is to clarify the differences between the way interstate and intra-state utility "transmission" lines and railroads (B.1), which are subject to State Corporation Commission regulation, are addressed by these rules , as contrasted with locally or regionally owned, built and maintained utility "service" lines. The Board is attempting to address these SCC-regulated utilites in a manner consistent with the way they are addressed in the Erosion and Sediment Control Law. In that respect, "natural" gas lines are included, but petroleum transmission lines are not.

Making changes as suggested by the HBAV would definitely constitute a "substantive" change, necessitating additional public comment. The Board is not willing to do so at this time. Furthermore, CBLAD staff is not convinced incorporating this recommendation is appropriate from a water quality protection perspective, since it focuses only on E&S control, which is temporary and does not account for the long-term treatment of increased stormwater runoff. (sc)

Text as initially recommended for change:

2. Construction, installation and maintenance of *local* water, sewer ~~and local~~, [*natural*] gas, [and *underground ~~fiber-optic~~ telecommunications*] *and cable television* lines shall be exempt from the criteria in this part provided that:

a. To the degree possible, the location of such utilities and facilities should be outside Resource Protection Areas;

b. No more land shall be disturbed than is necessary to provide for the ~~desired~~ *proposed* utility installation;

c. All such construction, installation and maintenance of such utilities and facilities shall be in compliance with all applicable state and federal permits and designed and conducted in a manner that protects water quality; *and*

d. Any land disturbance exceeding an area of 2,500 square feet complies with all erosion and sediment control requirements of this part.

Text as now recommended for change:

2. Construction, installation and maintenance of ***~~local~~*** water, sewer ~~and local~~, [*natural*] gas, [and *underground ~~fiber-optic~~ telecommunications*] *and cable television* lines ***owned, permitted, or both, by a local government or regional service authority*** shall be exempt from the criteria in this part provided that:

a. To the degree possible, the location of such utilities and facilities should be outside Resource Protection Areas;

b. No more land shall be disturbed than is necessary to provide for the ~~desired~~ *proposed* utility installation;

c. All such construction, installation and maintenance of such utilities and facilities shall be in compliance with all applicable state and federal permits and designed and conducted in a manner that protects water quality; *and*

d. Any land disturbance exceeding an area of 2,500 square feet complies with all erosion and sediment control requirements of this part.

The Board voted unanimously to adopt these changes.

Section Reference: **9VAC 10-20-150.C**
Subject: Exceptions
Comments made by: Charles Traub III, the Chesapeake Bay Foundation, Fairfax County, Henrico County, the Home Builders Association of Virginia, the City of Newport News, the Northern Virginia Regional Council, the Northern Virginia Soil and Water Conservation District, and Thomas Tomlin

Comments/Issues: *Thomas Tomlin:* The exceptions procedures are now requiring BZA efforts and rationale in a water quality law even if not using the zoning ordinances as the vehicle for the Chesapeake Bay regulations such as those jurisdictions that have stand alone ordinances.

Northern Virginia Soil and Water Conservation District: NVSWCD is pleased that the Board of Zoning Appeals (BZA) has been removed from this section because the authority granted to a BZA in the Code of Virginia § 15.2-2309, does not include any responsibility for water issues. The criteria to be used in evaluating exception requests, as stated in subparagraph 1.a, should be based mainly on water quality issues.

HBAV: Subsection C adds new provisions for conditions under which exceptions may be granted and requires local governments to establish a process for the administering the exception process. HBAV supports adding this exception process and acknowledges the necessity for water quality impact assessments to be performed to achieve the goal set forth in Part IV (9 VAC 10-20-110 et seq.). However, the lengthy list of criteria and the wording of the same are cumbersome. Localities that do not have an existing body to consider exceptions may forward them to groups without the proper knowledge to evaluate the request. Specifying so many requirements may only serve to make the process more difficult for localities to administer.

Henrico County: Section 9 VAC 10-20-150.150.C.3 unreasonably requires that virtually all exceptions to the requirements of local Chesapeake Bay Preservation Area (CBPA) programs be pursued through a formal public hearing process.

First, 9 VAC10-20-150.C.3.a. states that exceptions can be considered and acted upon only by the local legislative body; the local planning commission; or a special committee, board or commission established or designated by the local government.

Although 9 VAC 10-20-150.C.3.b. provides an option for consideration of exceptions through the zoning code's plan of development review process for requirements implemented through the local zoning ordinance, doing so does not alleviate the need to adhere to 9 VAC 10-20-150.C.3.a. Also, the proposed language does not provide a similar plan of development review process for requirements in ordinances other than zoning. Furthermore, the zoning ordinance option provides that exceptions may be considered only by the zoning administrator or the Board of Zoning Appeals. We believe those decisions should be made by other designated officials, perhaps in consultation with the zoning administrator. We also question whether the Board of Zoning Appeals has been provided necessary authority by the General Assembly for granting of the exceptions.

Finally, 9 VAC 10-20-150.C.3.c. requires that all exceptions be subject to a public notice and a public hearing. We believe these proposed requirements are likely the result of recently publicized Resource Protection Area (RPA) requirement issues in other localities. However, those issues are implementation concerns and should not result in the broad application of a formal exception procedure to virtually all requirements of local CBPA programs. The proposed language is burdensome and unnecessary, and its adoption will result in increased development costs and longer response times for decisions that can be (and are currently) appropriately made by local staff. We recommend the current language of 9 VAC 10-20-160 be retained.

If revisions are necessary to address implementation issues, the proposed language should be revised to clearly distinguish between RPA issues and other requirements. One suggestion is to specify the formal exception process for RPA issues and provide for the development of a separate, administrative waiver process for other issues. We feel there is neither the intent nor need to require a formal exception for decisions concerning technical items such as full compliance with pollutant removal requirements and setbacks from RPAs.

Fairfax County: In the July 30, 2001 draft of the revised Regulations, references to § 15.2-2309 of the Code of Virginia which covers the powers and duties of the local Board of Zoning Appeals (BZA) have been deleted. The July 30, 2001 draft does make it clear that local jurisdictions are required to designate or set up a some type of review body ("Board") outside the normal administrative review process, but not necessarily utilize the BZA, to review all exception requests (except for additions to existing legal principal structures) and to hold public hearings for individual exception requests. Additionally, based on the specific language proposed, it is implied that the "Board" has even more far reaching authority in that the "Board" is "established or designated by the local government to implement the provisions of the Act and this chapter."

Fairfax County has set up an administrative process for the review and granting of exceptions to the requirements of 9 VAC 10-20-110 et seq. within Chapter 118 (Chesapeake Bay Preservation Ordinance) of the County Code which does not involve a "Board" or public hearings. The County opposes any requirement which would mandate the delegation of authority for implementing the Regulations and the granting of exceptions to a "Board" or which would require public hearings be held for exception requests. This proposed process will needlessly lengthen plan review times and increase costs for both the local jurisdictions and property owners. The State has not demonstrated a compelling need for creation of a "Board" to administer local programs or review exception requests through a statewide or local compliance audit. Moreover, local jurisdictions should not be required to utilize criteria in evaluating exception requests (subparagraph 1.a.) that are not directly related to water quality issues.

Charles Traub advocates that CBLAD be the single authority for the granting of exceptions. His rationale and suggested language is provided.

Newport News: Subsection C.1.b states that "Granting the exception will not confer upon the applicant any special privileges that are denied by this part IV to other property owners who are subject to its provisions and who are similarly situated." Newport News considers this statement contrary to what an exception is. They believe that exceptions do confer special privileges that are denied to other property owners.

Subsection C.3.b does not give localities with stand alone ordinances enough protection. The City would like a phrase regarding other Land Development Ordinances added to this provision or a separate provision developed addressing exceptions as part of other Land Development Ordinances.

NVRC: Subsection C.3.b simply states what is already required in a zoning ordinance with respect to the administration of exceptions. According to CBLAD staff at the August 28th meeting, the purpose of the section is more communicative than regulatory. NVRC staff recommends that it would be more useful to local governments if the premise of the statement were turned around to read "Local governments implementing this chapter through the local zoning code may provide for specific provisions in the plan of development review process that allow for consideration of exceptions outside of those mandated under Code of Virginia § 15.2-2286(4) or § 15.2-2309."

Chesapeake Bay Foundation: CBF proposes the deletion of the words "*as warranted***"** in subsection 5.1.e. CBF proposes deletion of subsection C.2. Exceptions to Part IV should be governed by one process only, and that process should reflect the conditions noted in subsection C.1.

CBLAD Response: The proposed revisions to this section dealing with Exceptions is extensive and is in response to a significant amount of public comment on the initially proposed language that made direct reference to statutes that governed the Board of Zoning Appeals. Not all of the comments stated above will be addressed in this response; however, the Department does draw one's attention to the conflicting views that exist in the comments.

Issue #1 – <u>Criteria for Exceptions</u>: This criticism was raised during discussions where the first draft of a revised Subsection 150.C was addressed. Accordingly, changes were made and the list has only 4 criteria (one is being questioned and is addressed in the next paragraph) in addition to enabling localities to add their own and the provision for imposing conditions. Staff feels that the current proposal is responsive to the concerns that were previously noted.

C.1.b –Newport News' comment that this statement is contrary to what an exception is and that exceptions do confer special privileges that are denied to other property owners: CBLAD staff note that this provision is typical of many, if not most, local exception criteria. In fact, the granting of an exception does *not* confer a special privilege upon a property owner, as has been suggested by the City of Newport News. Exceptions are, by definition, granted to relieve a demonstrable hardship in an extraordinary case. The term "special privilege" denotes the granting of a right not otherwise enjoyed without consideration of hardship or reason. (lt)

Issue #2 – <u>Requirement for a Board or Commission to act</u>: The requirement for a local board or commission to act on exceptions is a specific objective in this proposed revision. Since development proposals require processing through a plan-of-development-review process, there is usually a board or commission involved. In general, the body that deals with the development proposal could formally act on the exception. In the instances where a board or commission is not involved, it seems reasonable that a planning commission could hear the exception. In any event, the number of exceptions that a

locality considers should be minimal. Staff recommends that this requirement remain with no further changes.

Issue #3 – Public Hearing Requirement: The requirement for a public hearing is a specific objective in this proposed revision. The Department feels that deviations from the requirements of the local Chesapeake Bay program development regulations should be handled similar to other types of deviations, or variances, from the local zoning (development) code. Also, the number of exceptions that a locality considers should be minimal. Staff recommends that this requirement remain with no further changes.

Issue #4 – Zoning Ordinance Compliance: As noted in the comments above, this subsection clarifies that absent a specific local provision for those localities whose Chesapeake Bay regulations are contained within their zoning regulations, the provisions of § 15.2-2286(4) or § 15.2-2309 apply. It also provides that a substitute process, meeting the requirements of 9VAC 10-20-150.C.3, can be used. The language suggested by NVRC states this intent well and it is recommended that the substitute language be used.

Issue #5 – Distinguish between RPA issues and other relief: The comments above clearly present the opposing views on this subject. The proposal does differentiate between RPA related items and other aspects of the local program. Accordingly, different findings are required. In this way, the proposed Regulations set out the framework within which the local program must be constructed. Instead of being more specific in the Regulations, the Department feels that the actual procedure is best accommodated at the local level where the exception process can be tailored to the local plan-of-development review process. Staff recommends that this requirement remain with no further changes.

Issue #6 – Authority of local boards: Comment: The reference cited in the comment pertains to one of the four options i.e. governing body, planning commission, board of zoning appeals (if the local program is entirely within the local zoning code), and the special board or commission. This language is used to accommodate those localities that have created a board or commission specifically for implementation of the local program. Please see Issue #2 for related comments. Staff recommends that this requirement remain with no further changes.

Issue #7 – Programs currently in place: While the Department's position on the requirements for a "board" and public hearing is set out above, this comment raises another issue. This issue deals with localities that have specific administrative provisions for exceptions contained in their local program (ordinances), especially those that were specifically reviewed and approved by CBLAB. The Department feels that the appropriate place to address this issue is in the direction of the Board and the guidance for local program update and implementation of the Regulation changes. That direction and guidance is being addressed separately but concurrently by the Board. Thus, staff recommends that there be no change to the Regulations themselves with regard to this issue.

Issue #8 – Specific CBF comment: Insertion of the term "as warranted" has been included so that 5.1.e is not read to mean that conditions are required as a part of any exception action. Staff recommends that there be no changes to this item. (dk)

Text as initially recommended for change:

b. If the implementation of the provisions of the Chesapeake Bay Preservation Act and this chapter is accommodated through the local zoning code, exceptions may be granted only pursuant to the provisions of § 15.2-2286 (4) or § 15.2-2309 of the Code of Virginia, unless there are specific provisions within the zoning code's plan of development review process that allow for consideration of exceptions as a part of that process.

Text as now recommended for change:

b. **[~~If the implementation of the provisions of the Chesapeake Bay Preservation Act and this chapter is accommodated through the local zoning code, exceptions may be granted only pursuant to the provisions of § 15.2-2286(4) or § 15.2-2309 of the Code of Virginia, unless there are specific provisions within the zoning code's plan of development review process that allow for consideration of exceptions as a part of that process.~~** ***Local governments implementing this chapter through the local zoning code may provide for specific provisions that allow for consideration of exceptions and that comply with this subsection C.3, outside of those mandated under § 15.2-2286(4) or § 15.2-2309 of the Code of Virginia.*** **]**

NOTE: The Board discussed this section further at the work session and heard opinions from several attendees representing local governments. There was discussion about reorganizing subsection 150.C so that the information flows better. There was also discussion about the burden on localities of holding public hearings on all exceptions to the performance criteria, as opposed to holding hearings just for RPA and buffer use or encroachment issues. The Board directed staff to make further changes to limit the application of public hearings to only those exceptions that involve RPA/buffer issues and to reorganize the subsection as discussed at the meeting. These proposed changes need to be reviewed by the Board prior to their consideration of adopting final regulations at their December 10, 2001 quarterly meeting.

Text as finally recommended for change:

C. [*Exceptions.*

1.] *Exceptions to the requirements of* [~~*Part IV (9 VAC 10-20-110 et seq.) of this chapter*~~ *9 VAC 10-20-120 and 9 VAC 10-20-130 may be granted, provided that*[~~*: (i) exceptions to the criteria shall be the minimum necessary to afford relief, (ii) reasonable and appropriate conditions upon any exception granted shall be imposed as necessary so that the purpose and intent of the Act is preserved, and (iii) the provisions of § 15.2-2309 of the Code of Virginia are met. Each local government shall design an appropriate process or processes for the administration of exceptions, in accordance with § 15.2-*~~

~~2309 of the Code of Virginia and subdivision 6 of 9 VAC 10-20-130.~~ *a finding is made that:*

a. The requested exception to the criteria is the minimum necessary to afford relief;

b. Granting the exception will not confer upon the applicant any special privileges that are denied by this part IV to other property owners who are subject to its provisions and who are similarly situated;

c. The exception is in harmony with the purpose and intent of this part IV and is not of substantial detriment to water quality;

d. The exception request is not based upon conditions or circumstances that are self-created or self-imposed;

e. Reasonable and appropriate conditions are imposed, as warranted, that will prevent the allowed activity from causing a degradation of water quality; and

f. Other findings, as appropriate and required by the local government, are met.

~~***2. Exceptions to other provisions of this part may be granted, provided that:***~~

~~***a. Exceptions to the criteria shall be the minimum necessary to afford relief; and***~~

~~***b. Reasonable and appropriate conditions upon any exception granted shall be imposed, as necessary, so that the purpose and intent of the Act is preserved.***~~

~~***3.***~~ ***2.*** *Each local government shall design and implement an appropriate process or processes for the administration of exceptions. The process* ***to be used for exceptions to 9 VAC 10-20-130*** *shall include, but not be limited to, the following provisions:*

a. An exception may be considered and acted upon only by the local legislative body; the local planning commission; or a special committee, board or commission established or designated by the local government to implement the provisions of the Act and this chapter.

b. ~~***If the implementation of the provisions of the Chesapeake Bay Preservation Act and this chapter is accommodated through the local zoning code, exceptions may be granted only pursuant to the provisions of § 15.2-2286 (4) or § 15.2-2309 of the Code of Virginia, unless there are specific provisions within the zoning code's plan of development review process that allow for consideration of exceptions as a part of that process.***~~ ***Local governments implementing this chapter through the local zoning code may provide for specific provisions that allow for consideration of exceptions that comply with subdivision 2 of this subsection, outside of those mandated under § 15.2-2286 (4) or § 15.2-2309 of the Code of Virginia.***

c. The provision of subdivision ~~***3***~~ ***2*** *b of this subsection notwithstanding, no exception shall be authorized except after notice and a hearing, as required by § 15.2-2204 of the Code of Virginia, except that only one hearing shall be required. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road*

from the property affected, the notice may be given by first-class mail rather than by registered or certified mail.

~~***d. Notwithstanding the provisions of subdivisions 3 a through 3 c of this subsection, additions and modifications to existing legal principal structures may be processed through an administrative review process, as allowed by subsection A of this section, subject to the findings required by subdivision 1 of this subsection but without a requirement for a public hearing. This provision shall not apply to accessory structures.***~~

3. Exceptions to other provisions of this part may be granted, provided that:

a. Exceptions to the criteria shall be the minimum necessary to afford relief; and

b. Reasonable and appropriate conditions upon any exception granted shall be imposed, as necessary, so that the purpose and intent of the Act is preserved.

4. Notwithstanding the provisions of subdivisions 2 a through 2 c of this subsection, additions and modifications to existing legal principal structures may be processed through an administrative review process, as allowed by subsection A of this section, subject to the findings required by subdivision 1 of this subsection but without a requirement for a public hearing. This provision shall not apply to accessory structures.

Section Reference: **9VAC 10-20-171**
Subject: Comprehensive Plans
Comments made by: The Hampton Roads Planning District Commission and the City of Newport News

Comments/Issues: Concern was expressed that adding back requirements for localities to "conduct an inventory" of piers and fisheries is not feasible and that including policies on siting private piers may go beyond local governments' authority due to property owner's riparian rights. The recommendation was to delete language regarding these issues.

CBLAD Response: References to these items were removed from the first public comment draft because the Department, at that time, was unable to provide comprehensive guidance on how to address these issues. Since that time, the Department has received a grant to develop guidance on appropriate methods for shoreland planning that will address these items in detail. Once the guidance is developed, the Department will work with affected localities to address these issues as comprehensive plans are revised.

In addition, the draft regulations do not require localities to conduct an inventory of piers and fisheries, but to include information on *"the character and location of commercial and recreational fisheries and other aquatic resources"* and on *"public and private waterfront access areas, including the general locations of or information about docks, piers, marinas, boat ramps, and similar water access facilities"*.

Therefore, CBLAD staff recommend no further changes in response to this comment. (sm)

Section Reference: **9VAC 10-20-191.A.1, A.2 and A.3**
Subject: Land Development Ordinances - - Revisions to Land Development Regulations
Comments made by: Arlington County, Fairfax County, Henrico County and the Home Builders Association of Virginia

Comments/Issues: The *HBAV* indicated the changes made to make the section more performance oriented are preferable to the previous language.

Fairfax County: In subsection 191.A.1, the reference to performance criteria that "protect" features listed in 9 VAC 10-20-90 is awkward, in that "protection" is really not required for RMA land types. Also, is not clear why the performance standards need to be incorporated directly into a locality's zoning ordinance if the locality has a "stand alone" ordinance incorporating these standards and if the locality's zoning ordinance references this ordinance. Also, it is unclear if paragraph A.2 requires that caps be placed on the amount of impervious area and disturbed area on lots. Paragraph A.2 could be interpreted as suggesting that localities establish requirements/thresholds for impervious cover, land disturbance, and preservation of indigenous vegetation in local land use regulations. If this is the intent, it should be stated more clearly. If it is not the intent, then clarification should be provided regarding what will be expected of localities (above and beyond a simple reference to the performance criteria of the locality's ordinance). The County would not be opposed to regulatory language that would provide localities with the option of establishing such thresholds as a mechanism to implement the impervious cover, land disturbance, and preservation of indigenous vegetation performance criteria. The County would recommend that CBLAD provide further guidance regarding the development and implementation of such standards for various land uses and/or zoning districts. Since the extent of any proposed use (e.g., size of building, driveway, parking, accessory structures, etc.) is site specific, a determination of what thresholds would be consistent with the Regulations would be difficult prior to submission of a development proposal. Therefore, it may be determined by individual localities to be more appropriate to address impervious cover, land disturbance, and tree preservation through site-specific analyses pursuant to the land use and development performance criteria. The County opposes the establishment of requirements/thresholds for impervious cover, land disturbance, and preservation of indigenous vegetation in land use regulations as a mandate on localities. *Fairfax County* also addressed subsection 191.A.3 by stating that County staff is unaware of any specific type of development which would be considered to be incompatible with Resource Management Area land categories and therefore cannot evaluate how this provision would be implemented.

Henrico County also addressed subsection 191.A.2, stating it requires that "specific development standards" be included in land development ordinances to address the three general performance criteria (minimizing land disturbance, minimizing impervious cover,

and preserving existing vegetation). However, no specific performance standards are provided and, therefore, consistent application of this requirement from locality to locality will be difficult, if not impossible. Therefore, as requested in the previous public comment period, Henrico recommends that this section be revised to require adoption of specific standards only after the Chesapeake Bay Local Assistance Department has developed, with input from affected stakeholders, appropriate measures to accomplish the general performance criteria.

CBLAD Response: With regard to 9 VAC 191.A.1, the observations by Fairfax County are pertinent. The reference to the performance is also addressed in subsections 191.A.2 and 191.A.3. The tie between subparagraph A.1 and zoning is meant to be in terms of allowable land use. Staff recommends that text in subparagraph A.1 that refers to performance standards and protecting sensitive environmental features be removed, since it is adequately addressed in subparagraphs A.2 and A.3. (See specific recommended changes at the end of this write-up.)

With regard to subsection 191.A.2, it is the intent that specific development standards addressing performance criteria 1, 2 and 5 be included in each locality's land development regulations. The Department acknowledges that a standard that is applicable to all localities cannot be established in the Regulations. Thus, the standards need to be developed on a locality-by-locality basis. The concern expressed by Henrico County regarding the mandatory timing of implementation is understandable. However, CBLAD will be providing guidance regarding this issue in a timely manner, and the guidance will be developed with local government and other stakeholder involvement.

With regard to subsection 191.A.3, one example involves development in flood plains that, while compatible with flood damage criteria, may be adverse to protecting water quality. Another involves development on highly erodible soils, including steep slopes, which if inappropriately designed may result in excessive post-construction erosion and sedimentation. Subsection 191.A.3 addresses standards for development and not land use types. (dk)

Text as initially recommended for change:

9 VAC 10-20-191.A.1. Local zoning ordinances shall include performance standards that protect sensitive environmental features, as listed in 9 VAC 10-20-80 and 9 VAC 10-20-90, and ensure that the uses permitted by the local zoning regulations are consistent with the Act and this chapter.

Text as now recommended for change:

9 VAC 10-20-191.A.1 Local zoning ordinances shall **[~~include performance standards that protect sensitive environmental features, as listed in 9 VAC 10-20-80 and 9 VAC 10-20-90, and~~]** ensure that the uses permitted by the local zoning regulations are consistent with the Act and this chapter.

The Board voted unanimously to adopt this change.

Section Reference: **9VAC 10-20-191.A.4**
Subject: Land Development Ordinances; Plat Information
Comments made by: Arlington County, Fairfax County, Henrico County and the Home Builders Association of Virginia

Comments/Issues: Arlington County believes the inclusion of a requirement for incorporation of RPA and RMA boundaries on plats, including the addition of notations about buffer requirements, as well as septic tank pump-out and drainfield restrictions, will be extremely burdensome. Plats, which are an important element of a local government's land records system, are not an appropriate vehicle for recording what in Arlington is effectively a zoning overlay district. Furthermore, Arlington designated the entire County as either RPA or RMA. Therefore, this provision would require significant changes and recordation of over 57,000 individual plats. If the objective is to inform property owners of site limitations, this does not appear to be a practical, cost-effective approach.

Fairfax County notes that the requirement to have notes on the plat regarding the minimum 100 foot buffer, 100% reserve sewage disposal, and pump out could be misleading since there are other options provided for in the regulations. For example, Fairfax County has alternating septic fields with a 50% reserve and our buffer component can be in excess of 100 feet where the major floodplain limit is more than 100 feet from the stream and contiguous wetlands. Additionally, these requirements can and have changed over time. The County does not have an objection to including references to the appropriate sections of local ordinances that incorporate these requirements on subdivision plats. The County recommends that this section of the regulations be revised to require that notes on plats reference the appropriate sections of local ordinances where these requirements are located rather than require a recitation of the requirements on plats.

Henrico County notes that this subsection requires local ordinances and regulations to provide for several environmental notations to be added to site plans and plats, including a plat notation of the requirement for pump-out and 100% reserve drainfield sites for on-site sewage treatment systems, when applicable. The County recommends that language be added related to certification of this requirement by the health department in accordance with State Code.

The HBAV does not feel CBLAD has the authority to make such requirements, and plats may not be appropriate places for such notations.

CBLAD Response: CBLAD staff discussed the topic of boundary delineations on plats and the inclusion of notes with focus groups and at meetings with local government representatives at several Planning Districts/Regional Commissions during the first comment period. During those discussions it was acknowledged that the use of notes on plats is a common practice used by localities to provide a formal notice to property owners of restrictions and compliance matters associated with their lots. This subsection

does not state the specifics of how the delineations and notes are to be applied, but it does require that each locality address this item and develop a solution that is appropriate for its individual circumstance. The requirement is not retroactive; it would be applied when new plats are processed. Therefore, CBLAD staff recommends that there be no further changes made in response to these comments. (dk)

At the Board work session on October 31, 2001 an inquiry was made regarding the requirements of 9 VAC 10-20-191.A.4. The inquiry centered upon the situation wherein a RPA designation is made on a plat of record and the feature (e.g. a shoreline) changes over time to the extent that the delineated boundary no longer reflects a 100-foot buffer from the actual feature. The question was "does the lot have to be re-platted to show the actual RPA?" Since the meeting was running long, the Board asked staff to provide a response at their December 10, 2001 quarterly meeting, prior to their taking any action to adopt final regulation amendments.

In response to this request, it is important to understand that subsection 191.A, which requires local governments to ". . . review and revise their land development regulations, as necessary, to comply . . . ," provides the context for the requirement to notate RPA and RMA boundaries on plats, as set forth in 191.A.4. It is conceivable, and perhaps even appropriate, that each local government may implement subsection 191.A.4 in a different way. Therefore, CBLAD will need to issue guidance on this item, as it will for other items pertaining to Section 10-20-191. This guidance will be developed with local government input and will include the following concepts:

1. The depiction required by 10-20-191.A.4 would involve a line denoted as representing the RPA and a line denoted as representing the RMA, along with a note that explains what the labels RPA and RMA mean.

2. The depiction may be by metes-and-bounds or it may be more general and refer to a 100-foot distance from the edge of the RPA feature. This determination would be made locally and would involve consideration of the type of feature that exists, the type of development that is to occur, and the practices of the locality. In either case, the accompanying plat note will need to clearly state that the feature and the outward edge of the RPA must be field-delineated prior to approval of any construction. In almost all cases the RMA depiction would be generalized since it is based on more general characteristics, such as the extent of a 100-year flood plain or the edge of a steep slope.

3. When a general depiction of the RPA and RMA lines is used, it is the opinion of CBLAD that a re-plat would not be required following the more specific field-delineation. If a metes-and-bounds description is used, lending institutions or title insurance companies may require a re-plat, even though the plat note states that the field-delineation will govern with regard to the actual establishment of the RPA boundary.

4. The key to avoiding problems lies with the language of the plat note. The note will address the other items identified in 9 VAC 10-20-191.A.4 and other pertinent information that applies to the site with regard to the RPA and RMA designations.

Section Reference: **9VAC 10-20-191.B**
Subject: Review of Land Development Regulations
Comments made by: Fairfax County, the City of Newport News and the Northern Virginia Regional Council

Comments/Issues: Fairfax County notes that subsection 191.B.1 references "water quality goals of the Act and this chapter," yet it does not appear that either the Act or Regulations identify "goals." Absent an explicit list of "goals," it is not clear what, specifically, this paragraph would require. The NVRC stated that the proposed Regulations should make specific reference to the goals referred to in the statement ". . . identify any obstacles to achieving the water quality goals of the Act and this chapter."

Fairfax County also commented that subsection 191.B.3 would require localities to "review and revise their land development ordinances and regulations to ensure consistency with the water quality protection goals, objectives, policies, and implementation strategies identified in the local comprehensive plan." Clarification should be provided as to whether this paragraph would require a locality to incorporate into regulation any water quality-related comprehensive plan policy that has been intended for implementation through negotiations and commitments during the zoning process (e.g., rezonings, special exceptions, and special permits) rather than through ordinance requirements. County staff would not support such an interpretation, but would instead support the identification of water quality needs of each locality through a collaborative approach between CBLAD and local government staffs, considering the specific land use, planning, and zoning context of the locality.

The City of Newport News would prefer that the word "should" be used instead of "shall" throughout all of subsection 191.B, because "shall" allows for little flexibility for addressing varying local circumstances. Though consistency among various regulations is an admirable goal, City staff thinks that making these regulation changes would be ineffective in an urban area as it will gain little in "water quality" compared to the amount of effort it will take. If approved as written, the City prefers to determine when the work will be undertaken and the length of time it will take to complete these tasks.

CBLAD Response: Contrary to Fairfax County's opinion regarding the lack of goals in the Act and regulations, there are very clear goals in both. Although they are not labeled "goals," there are indeed five goals listed in § 10.1-2107.B of the Act. These are reiterated in 9 VAC 10-20-50 of the regulations. As well, CBLAD staff have noted in responses to public comments pertaining to the regulation amendments that 9 VAC 10-20-110 of the regulations includes "goals" to allow no net increase of pollution from new development, provide a 10% reduction of pollution from redevelopment, and to provide a

40% reduction of pollution from agricultural and silvicultural uses. To make this clear, these citations could be referenced in this subsection.

The intent of subsection 191.B.1 is very broad and provides the general requirement for a review of local land development ordinances and regulations. The mandatory aspect of this requirement is to be carried out through the provisions of 9 VAC 10-20-231.3 (Phase III). Prior to mandatory compliance with that subsection, the Board will issue guidance as was done with the Phase I and Phase II components. The guidance for compliance with subsection 191.B.3 will also be a part of the Phase III program. Thus, compliance with this subsection will be structured per the circumstances of a locality (e.g., the construct of the local comprehensive plan and land development regulations). Finally, the word "shall" is necessary in order to accommodate enforceability of these provisions. As noted in each of the above responses, the provisions of subsection 191.B relate to the Phase III program for which guidance will need to be prepared, subject to public review, and adopted by CBLAB prior to establishing mandatory compliance. Therefore, CBLAD staff recommends that there be no further changes to subparagraphs B.2 and B.3 in response to these comments.

Text as initially recommended for change:

9 VAC 10-20-191.B.1 Local governments shall evaluate the relationship between the submission requirements, performance standards, and permitted uses in local land development ordinances and regulations to identify and obstacles to achieving the water quality goals of the Act and this chapter. Local governments shall revise these ordinances and regulations, as necessary, to eliminate any obstacles identified in the submission requirements or development standards.

Text as now recommended for change:

9 VAC 10-20-191.B.1 Local governments shall evaluate the relationship between the submission requirements, performance standards, and permitted uses in local land development ordinances and regulations to identify and obstacles to achieving the water quality goals of the Act and this chapter **[*as set forth in § 10.1-2107.B of the Act, 9 VAC 10-20-50 and 9 VAC 10-20-110*]**. Local governments shall revise these ordinances and regulations, as necessary, to eliminate any obstacles identified in the submission requirements or development standards.

The Board voted unanimously to adopt this change.

Section Reference: **10-20-250**
Subject: Enforcement
Comments made by: The Chesapeake Bay Foundation

Comments/Issues: The CBF notes that, as evidenced through recent disputes that have received substantial publicity (recent newspaper articles were attached to their comments), they believe Board enforcement of the regulations has been inadequate.

Similarly, they believe the processes contained in the amended regulations fail to provide an enforcement mechanism that will be effective in compelling compliance by local governments. The CBF feels the Board's history has been one of extended deliberation and cajoling in the face of jurisdictions that choose to forego appropriate implementation of the regulations or directives from the Board. The CBF recommends that the Board substantially alter the enforcement provisions, allowing for a more direct and effective process.

CBLAD Response: The proposed amendments to this section will help to ensure proper implementation and enforcement of local programs through an annual implementation report and five-year compliance review processes. An Implementation review process for phase I consistency is currently being developed and will begin by early 2003. This process will be a complete audit of all elements of Phase I of local programs and their actual local implementation and enforcement. It is through this process that the Board will ensure compliance with the Act and Regulations. (ml)

Section Reference: **10-20-250.1.a.**
Subject: Annual Reporting
Comments made by: Fairfax County, York County and the Hampton Roads Planning District Commission

Comments/Issues: Fairfax County notes that there are no substantive changes in the July 30, 2001 draft of the proposed regulations other than to specify a 5-year cycle instead of the originally proposed 4-year cycle for compliance audits. If annual reporting and compliance review requirements are determined to be necessary, the County believes the Board and Department should develop these requirements in close coordination with regulated localities in order to ensure that these requirements will not be excessive. The County does not support overly burdensome reporting or review requirements that would require the collection of large amounts of data.

York County and the HRPDC are also concerned that the regulations do not specify what is to be required of local governments in developing local annual program reports. The local governments of Hampton Roads are concerned that annual reporting requirements could become overly burdensome, especially when added to annual reporting requirements associated with other state stormwater programs. Recent discussions between HRPDC and CBLAD staff indicate a willingness to work with the Virginia Department of Conservation, the Virginia Department of Environmental Quality, and the Hampton Roads localities to develop a set of mutually satisfactory reporting requirements. They encourage this effort and recommend that the Board, through its staff, work closely with the local governments of Hampton Roads in determining the requirements for annual local program reports under the Bay Act.

CBLAD Response: CBLAD will consider the above concerns when the annual report program is established. For the most part, the reports of the various stormwater agencies typically seek different kinds of information, with some overlaps. CBLAD has committed to work with DCR and DEQ to attempt to distill all the distinct information

requirements so that localities can create one report that will satisfy all three agencies. The thrust of 9 VAC 10-20-250 is the review of local program implementation compliance. The annual report process and the self-evaluation process are seen as the most efficient and effective way to proceed. As written, the regulations are providing general direction regarding how to approach this matter. Therefore, CBLAD staff recommend no further changes to this section in response to these comments. (ml)

ITEMS FOR WHICH THERE IS NO SPECIFIC SECTION REFERENCED.

Subject: **Redevelopment; IDA's**
Comments made by: The Hampton Roads Planning District Commission

Comments/Issues: The HRPDC perceives a need for flexibility to be incorporated into the general performance standards, especially as they relate to buffers. This becomes apparent when one considers the flexibility the regulations allow in designated Intensely Developed Areas. The flexibility allowed within IDAs can encourage development practices that result in net reductions in nutrient and sediment loads and also promote development and reinvestments in urbanized areas. Actions taken to achieve these improvements may conflict with the general performance standards unless flexibility is provided.

CBLAD Response: Section 9VAC10-20-130.C specifically states that the only criteria that are specifically required of redevelopment activities is the criteria under 9 VAC10-20-120.6 and 8. This section of the regulations (9VAC 10-20-40*)* begins by stating that local governments are responsible to ensure proposed uses and development meet all the following criteria, including the three general criteria referenced above. The regulations allow local governments to apply a practicality test on a case-by-case basis where the criteria language may be general or subjective and, therefore, new language does not need to be added. As 9 VAC10-20-130.C specifically outlines which of the performance criteria are to be required for redevelopment activities, both within and outside of IDAs, the flexibility has already been considered.

In light of 9 VAC 10-20-130.7, pertaining to buffer requirements within IDAs, if enough natural vegetation exists within IDAs on parcels large enough to have a buffer area and still be reasonably developed, then preserving these buffers would be consistent with the idea of establishing vegetation in the buffer area over time, where feasible. At any rate, the Board has the final approval authority over local IDA designations and will determine the appropriateness of each proposed IDA designated as it is submitted. (ml)

Subject: **100-foot buffer area**
Comments made by: Monte Penney and Vic Schmidt (general public)
Comments/Issues: Support for the full 100-foot buffer area
CBLAD Response: CBLAD staff concurs.

Subject: **CBLAD responsiveness to earlier comments**
Comments made by: Arlington County, Fairfax County, the Hampton Roads Planning District Commission, Henrico County, the Home Builders Association of Virginia, the Northern Virginia Regional Commission, the Virginia Association of Counties, York County

Comments/Issues: Arlington County and the HRPDC noted the considerable efforts the CBLAD staff have made to identify and understand the concerns of local governments during this process to amend the Bay Act regulations. They stated this is reflected in the more recent proposed revisions. Furthermore, HRPDC expressed appreciation for the numerous occasions when CBLAD staff made themselves available to brief the PDC's Chesapeake Bay Local Assistance Department Bay Committee and answer its questions. They noted that the attentiveness CBLAD staff showed toward their localities is unique among the Commonwealth's natural resource agencies. Arlington County, Fairfax County, Henrico County and the NVRC noted that they were pleased with the degree to which CBLAD considered and, in many cases, effectively addressed comments from the first (Fall 2000) public comment period. The HBAV and VACO likewise noted their appreciation of the agency's and Board's efforts to address many concerns expressed during the first public comment period. York County noted that the proposed clarifications in the regulations regarding the 100-foot buffer will assist the County staff and are appreciated.

CBLAD Response: CBLAD staff and the Board appreciate recognition of its efforts to understand and effectively respond to the public's comments and concerns. (sc)

Subject: **Public Participation Process**
Comments made by: Arlington County, Fairfax County, Middle Peninsula Planning District Commission, Northern Virginia Soil and Water Conservation District, Prince William County, and the Sierra Club (Falls of the James Chapter)

Comments/Issues: Fairfax County is still not satisfied with some of the regulation provisions and requests the Board to withdraw from any regulatory action at this time, make further revisions based on the most current public comments, and readvertise the further changes for additional comment and consultation with local governments and other affected parties. Arlington County, the Middle Peninsula PDC, the Northern Virginia SWCD and Prince William County noted that holding the second public comment period in August was the worst time of year (due to summer vacations) and that the 30-day comment period was not long enough for broad-based review of the proposed revisions. They asked that the public comment period be extended to October 30, 2001 (totaling approximately 90 days for comment). The Sierra Club felt the Board's current revisions of the earlier draft amendments reverse strengthened provisions in the earlier draft without adequate public hearings (alleging private negotiations with particular interest groups and legislators), and they request an additional public hearing of the Board's consideration of these concerns.

CBLAD Response: Following the first comment period, the Board was responsive to requests for more discussion and meetings with stakeholders to explain and clarify new provisions of the regulations and to have time to understand various stakeholder concerns. The Board and CBLAD staff took eight months, during which time several Board work sessions were held to discuss public comments and various recommended responses. In addition, numerous meetings were held with various stakeholder groups, as requested. This latest public comment period, pertaining to further revisions of the regulations, was not timed to impede or discourage comment. It followed directly on the last Board work session, with the Board's intention to try to bring the process to a conclusion with the adoption of final regulations this fall. The Board deemed the 30-day time period sufficient, given all the discussion that had occurred among the stakeholders and the number of public meetings that had been held to discuss the regulation revisions. A 30-day time period for an additional public comment period also seems to be fairly typical for other regulatory agencies.

Comments about the timing of public comment periods or their duration are not unusual in regulatory processes. For example, the Board received comments pursuant to the first public comment period to the effect that it was ill-timed, coming just prior to the General Assembly session and related organizational preparations. Likewise, the Board has been urged not to conduct public comment during Assembly sessions because that is too busy a time period for attention to other matters. Taking into account public objections to various time frames for public comment, one might surmise that there is really no good time of year to conduct such processes.

While far fewer comments were filed during this comment period, staff suspects the reason is that most of the concerns from the earlier comment period were effectively addressed. Furthermore, the comments that were submitted are reflective of the various stakeholder groups that commented during the original comment period. Staff also suspects that some organizations may have chosen not to provide substantive comments or to comment at all in order to make their point that the time period was not sufficient. CBLAD staff will call the Board's attention to these comments about public process, but staff recommends that no additional extension of the comment period or hearings is necessary. (sc)

Subject: **Economic Impact**
Comments made by: Northumberland County Board of Supervisors

Comments/Issues: The Northumberland County Board of Supervisors requests that the Board not adopt any proposed regulation amendments until the Board assures that either state funding is available for anticipated additional local staffing needs or, alternatively, the Board eliminates the additional tracking/reporting/auditing requirements from the proposed amendments.

CBLAD Response: While the Board and agency have repeatedly attempted to protect and enhance funding for grants to localities to aid in implementing local Bay Act programs and have requested additional staff to provide more technical assistance and

program oversight, neither the Board nor the agency has any control over the legislative budgeting process.

At the same time, the Act requires the Board to assure that local programs are being properly implemented. Without more staff to audit local program implementation, self-reporting/auditing is the only practical alternative. The agency will work with its local government advisory committee to develop a check-list and audit process that balances the agency's information needs against the stresses on local staff and resources. As well, CBLAD will be coordinating with DCR and DEQ to avoid duplication of reporting requirements and, to the degree feasible, provide for streamlined reporting. With these efforts in mind, staff recommends that the Board not delay its adoption of final regulations. (sc)

Subject: **Support of proposed changes to strengthen water quality protection**
Comments made by: Doris Baker, Vic Schmidt, Robert Speisser and Monte Penney (general public)

Comments/Issues: These commenters support the strengthening of the vegetated buffer requirements specifically and the proposed changes to the regulations in general. One requested that the changes be adopted as soon as possible.

CBLAD Response: CBLAD staff will inform the Board of their support. (sc)

Subject: **Local discretion/flexibility and balancing water quality protection with economic considerations.**
Comments made by: Peninsula Housing & Builders Association

Comments/Issues: Bay Act decisions should be made by local governments that have flexible options, not by the State or through "regulations that are formulated for one-size-fits-all." Allow the Bay to be protected to the greatest reasonable extent while balancing economic considerations.

CBLAD Response: In order to be able to evaluate local program implementation effectiveness, the Bay Act regulations must have some standards that all localities must meet. This also assures that the rules are being evenly applied. However, the Board has also included many areas of flexibility within the regulations for localities and property owners, to allow local governments to mold their programs to their unique settings (e.g., urban vs. rural, coastal vs. piedmont, much waterfront vs. little waterfront, etc.) and to account for unusual site-related circumstances. As a matter of policy, the Board also considers alternative/equivalent local approaches to aspects of the rules, such as stormwater management, which has resulted in even further local program customization. Therefore, CBLAD takes the position that the regulations are far from a "one-size-fits-all" solution. Furthermore, as part of the difficult balancing that must occur in these regulations, the Board tries hard to take into account economic considerations. A good example of that is the amended language in the current revision pertaining to

development and redevelopment within locally designated Intensely Developed Areas, which are intended to make it easier and less costly to develop within built-up metropolitan areas. (sc)

Subject: **Buffers**
Comments made by: Thomas Tomlin (Northumberland County Board of Supervisors)

Comments/Issues: Objects to the different flexibilities allowed for buffers in different land use settings (developed, agricultural, silvicultural) as a denial of equal protection under the law for residential landowners.

CBLAD Response: This comment was submitted during the earlier public comment period and has already been addressed. For the same reasons cited by the original Board for allowing some differences in the way buffer requirements are addressed for these different land uses, the current Board decided to continue to allow for these differences. (sc)

Subject: **Enforcement**
Comments made by: Marvin Barnes (citizen)

Comments/Issues: While the Board has tried to pass enforcement responsibilities to local governments, the commenter does not see any "teeth" in the latest regulation revisions. The regulations do not indicate how CBLAD will review required annual reports from localities or inspect local compliance, or how often records of local decisions will be reviewed. He does not perceive that CBLAD has any authority to correct any problems identified with local implementation, and therefore he does not believe the regulation revisions will lead to any improvements in local program implementation.

CBLAD Response: The process to review local implementation is still being worked out. A checklist and audit process will be proposed and, with input from CBLAD's local government advisory committee, will be finalized. The agency will continue to try to get additional staff and resources, but oversight will be conducted even with current resources. While the Board does not currently have authority to take action on individual violations of a local ordinance, the Board does have the authority to take a non-compliant locality to court to force correct implementation of the local program. CBLAD prefers to work proactively with its local government partners to improve local implementation but, even though litigation is not the preferred or most expedient form of enforcement, the Board has been very successful when it has found it necessary to take legal action. (SC)

Subject: **Appropriate agency authority over specific performance criteria**
Comments made by: Fairfax County, the Hampton Roads Planning District Commission, the Home Builders Association of Virginia, the Northern Virginia Soil and Water Conservation District, and York County

Comments/Issues: Enforcement of septic tank, forestry and agricultural requirements is more appropriately the role of the Virginia Department of Health, Department of Forestry, and Soil and Water Conservation Districts, respectively. These state agencies are better equipped with the authority, expertise, and resources to effectively implement those provisions of the Bay Act regulations that are outside the traditional roles of local governments. The reluctance of state agencies to assume these enforcement responsibilities is not sufficient justification to impose the responsibility on local governments.

More specifically, HRPDC noted that the Virginia Department of Health is currently considering amending its regulations to include septic tank maintenance provisions. HRPDC encourages CBLAD staff to participate in this effort toward VDH adopting such provisions. If VDH adopts septic system maintance requirements, the Board should eliminate these provisions from the Bay Act regulations.

HBAV believes CBLAD is "treading on the territory of the State Department of Health, which possesses the expertise and authority required . . ." to deal with septic systems. HBAV calls attention to an Attorney General opinion which prohibits differing sewage handling and disposal regulations for different parts of the state, so HBAV believes CBLAD is overstepping its authority in trying to establish differing standards for septic systems within the area under the jurisdiction of the Bay Act.

Fairfax County And the NVSWCD contend the agricultural enforcement provisions of 9 VAC 10-20-130.5.b(2) conflict with the Virginia Agricultural Stewardship Act, under which the Commissioner of Agriculture is authorized to regulate and enforce against agricultural pollution discharges. These responsibilities should not be transferred to localities and SWCDs.

CBLAD Response: Comments similar to these were submitted during the earlier public comment period and have already been addressed. It is important to note (1) CBLAD has no authority over any other state agency to require it to implement and enforce provisions of the Bay Act regulations; and (2) the Bay Act was intended to be supplementary to other water quality protection programs (§10.1-2113 of the Code of Virginia). This supplementary authority enables the Board to address water quality problems and issues that are not adequately addressed under related programs of other agencies.

Regarding Health Department authority and the Attorney General's opinion about septic system regulations, the opinion related to the VDH sewage handling regulations only. It stated that the authority for that set of regulations limited them to having a single set of standards that must apply state-wide, rather than different standards that might apply in different regions of the state. The AG opinion has no bearing on the Bay Act regulations. As stated previously, the reason these regulations address septic system maintenance is that it is the source of potentially critical water quality problems and is not addressed at all in the current VDH regulations. CBLAD is participating in the process to amend the VDH regulations to include system maintenance requirements. If these are eventually adopted into the VDH regulations, it is highly likely that the CBLAB will rescind the requirements from the Bay Act regulations.

Regarding the Commissioner of Agriculture's authority to address agricultural pollution under the Agricultural Stewardship Act, he can only act if there is clear evidence of actual pollution (a violation of a DEQ water quality standard), which occurs after the fact, or the clear potential for such a violation. The intention of the Bay Act regulations is to prevent pollution from occurring in the first place. CBLAD is interested in having conservation problems addressed early so as to prevent even the potential for water quality pollution occurring. Such early identification of problems would not be sufficient to trigger the threshold for action under the Agricultural Stewardship Act. Regarding SWCD involvement, CBLAD has clarified in the latest revision of the regulations that districts would only have to report violations in the most egregious situation, where a landowner simply refuses to take the right and necessary action. (sc)

Subject: **Implementation schedule**
Comments made by: The Hampton Roads Planning District Commission and York County

Comments/Issues: The HRPDC notes that a schedule for implementing the regulatory amendments locally after the Board adopts them has not been released. The Hampton Roads localities, including York County, are concerned about having an adequate amount of time and resources to make the required changes to their local programs after the adoption date. The HRPDC recommends that the Board, through its staff, work closely with the Hampton Roads local governments to develop a feasible implementation schedule.

CBLAD Response: The Board and agency are aware of local government concerns that they be given a reasonable amount of time to implement the regulatory changes. The Board intends to be reasonable about the implementation schedule and has demonstrated its willingness to work with localities in the past regarding deadlines, etc. (sc)

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